No. 17-6086

IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

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IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States of America v. Herman Avery Gundy

Case No. 16-1829

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
05/18/2017	54	CASE, BEFORE RCW, SLC, CFD, C.JJ., HEARD. [2038020] [16-1829] [ENTERED: 05/18/2017 10:26 AM]
06/22/2017	57	SUMMARY ORDER AND JUDGMENT, AFFIRMING THE DISTRICT COURT JUDGMENT, BY RCW, SLC, CFD, C.JJ., FILED. [2063858] [16-1829] [ENTERED: 06/22/2017 09:55 AM]
07/13/2017	59	JUDGMENT MANDATE, ISSUED. [2078539] [16-1829] [ENTERED: 07/13/2017 04:28 PM]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States of America v. Herman Avery Gundy

Case No. 13-3679

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
10/28/2014	68	CASE, BEFORE RAK, CH. J., PWH, SLC, C.JJ., HEARD. [1355726] [13-3679] [ENTERED: 10/28/2014 11:37 AM]
09/14/2015	70	OPINION, REVERSING THE DISTRICT COURTS ORDER DISMISSING THE INDICTMENT AND REMANDING THE CAUSE TO THE DISTRICT COURT FOR REINSTATEMENT OF THE INDICTMENT AND FOR FURTHER PROCEEDINGS CONSISTENT THIS OPINION, BY RAK, PWH, SLC, FILED. [1597084] [13-3679]--[EDITED 09/14/2015 BY RO] [ENTERED: 09/14/2015 10:19 AM]
10/07/2015	77	JUDGMENT MANDATE, ISSUED. [1614554] [13-3679] [ENTERED: 10/07/2015 11:13 AM]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

United States of America v. Herman Avery Gundy

Case No. 1:13-CR-00008

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
12/03/2012	1	COMPLAINT as to Herman Avery Gundy (1) in violation of 18 U.S.C. 2250. (Signed by Magistrate Judge Gabriel W. Gorenstein) (gq) [1:12-mj-03113-UA] (Entered: 12/03/2012)
01/07/2013	5	INDICTMENT FILED as to Herman Avery Gundy (1) count(s) 1. (jbo) (Entered: 01/07/2013)
05/22/2013	33	MEMORANDUM AND ORDER: as to (13-Cr-8) Herman Avery Gundy. Defendant Herman Avery Gundy is charged with one count of failing to register as a sex offender under the Sex Offender Registration and Notification Act, 18 U.S.C. Section 2250. Gundy has moved to dismiss the Indictment. For the reasons that follow, his motion is granted....[See Memorandum And Order]... Conclusion: For the foregoing reasons, Defendant's motion to dismiss the indictment

		is GRANTED. SO ORDERED. (Signed by Judge J. Paul Oetken on 5/22/2013)(bw) (Entered: 05/22/2013)
05/31/2013	34	MOTION for Reconsideration. Document filed by USA as to Herman Avery Gundy. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Quigley, Brendan) (Entered: 05/31/2013)
09/11/2013	36	OPINION AND ORDER as to Herman Avery Gundy re: 34 MOTION for Reconsideration filed by USA. Defendant Herman Avery Gundy was charged with one count of failing to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250. On May 22, 2013, this Court granted Gundys motion to dismiss the indictment, holding that Gundy was not subject to SORNAs registration requirements at the time of the interstate travel alleged by the Government. For the foregoing reasons, the Governments motion for reconsideration is DENIED. (Signed by Judge J. Paul Oetken

		on 9/11/2013)(jw) (Entered: 09/11/2013)
09/27/2013	37	NOTICE OF APPEAL by USA as to Herman Avery Gundy from 33 Memorandum & Order, 36 Opinion & Order. (nd) (Entered: 09/30/2013)
10/07/2015	39	MANDATE of USCA (Certified Copy) as to Herman Avery Gundy re: 37 Notice of Appeal. USCA Case Number 13-3679. IT IS HEREBY ORDERED, ADJUDGED and DECREED that the district court's order dismissing the Indictment is REVERSED and the cause is REMANDED to the District Court for reinstatement of the Indictment and for further proceedings in accordance with the 38 opinion of this court.. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 10/07/2015. (nd) (Entered: 10/07/2015)
03/28/2016		COURT VERDICT as to Herman Avery Gundy (1) Guilty on Count 1. (jbo); Modified on 5/31/2016 (bw). (Entered: 03/29/2016)

03/28/2016	50	STIPULATION - UNSIGNED as to Herman Avery Gundy. (ft) (Entered: 03/28/2016)
05/27/2016	58	ORDER OF TIME SERVED: as to Herman Avery Gundy. It is hereby ordered that Herman Avery Gundy, the defendant, is hereby sentenced to time served. SO ORDERED: (Signed by Judge J. Paul Oetken on 5/27/2016)(bw) (Entered: 05/27/2016)
05/27/2016	59	JUDGMENT In A Criminal Case. Date of Imposition of Judgment: 5/27/2016. Defendant Herman Avery Gundy (1) was found guilty on Count(s) 1, after a plea of not guilty. IMPRISONMENT: Time Served. The defendant is remanded to the custody of the United States Marshal. SUPERVISED RELEASE: 5 years. The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. The defendant shall cooperate in the collection of DNA as directed by the probation officer. Special Conditions of Supervision: -The defendant will register with the state sex offender registration agency in any state where he

		resides, where he is employed or works, and shall provide proof of registration to the probation officer. -The defendant shall participate in an outpatient substance abuse treatment program approved by the Probation Office, which may include testing to determine whether you have reverted to using drugs or alcohol. The defendant shall contribute to the costs of services rendered based on ability to pay and availability of third-party payment. The Court authorizes the release of available drug treatment evaluations and reports, including the presentence report, to the substance abuse treatment provider. -The defendant shall undergo a sex-offense-specific evaluation and participate in a sex offender treatment and/or outpatient mental health treatment program approved by the probation officer. The defendant shall abide by the rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph testing. The defendant shall waive confidentiality with respect to

		any records for mental health assessment and treatment imposed as a consequence of this judgment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant shall contribute to the costs of services rendered based on the ability to pay or availability of third party payment. The Court authorizes the release of available psychological and psychiatric evaluations and reports, including the presentence investigation report, to the sex offender treatment provider and/or the mental health treatment provider. -The defendant shall report to the nearest Probation Office within 72 hours of the judgment. -The defendant shall be supervised by the district of residence. -The fine is waived because of inability to pay. -The defendant will pay a special assessment in the amount of $100.00. ASSESSMENT: $100.00, due immediately. (Signed by Judge J. Paul Oetken on 5/27/2016)(bw) (Entered: 05/31/2016)

06/01/2016	60	AMENDED JUDGMENT In A Criminal Case. Date of Imposition of Judgment: 6/1/2016. Date of Original Judgment: 5/27/2016. Reason for Amendment: Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36). Defendant Herman Avery Gundy (1) was found guilty on Count(s) 1, after a plea of not guilty. IMPRISONMENT: Time Served. SUPERVISED RELEASE: 5 years. The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. The defendant shall cooperate in the collection of DNA as directed by the probation officer. Special Conditions of Supervision (see page 4 of Judgment). ASSESSMENT: $100.00, due immediately. (Signed by Judge J. Paul Oetken on 6/1/2016) [*** NOTE: See Imprisonment page, page 2 of Judgment. ***](bw) (Entered: 06/01/2016)
06/08/2016	61	NOTICE OF APPEAL by Herman Avery Gundy from 60 Amended Judgment, 59 Judgment. (nd) (Entered: 06/09/2016)

06/16/2016	62	2nd AMENDED JUDGMENT In A Criminal Case. Date of Imposition of Judgment: 6/16/2016. Date of Original Judgment: 6/1/2016. Reason for Amendment: Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36). Defendant Herman Avery Gundy (1) was found guilty on Count(s) 1, after a plea of not guilty. IMPRISONMENT: Time Served. SUPERVISED RELEASE: 5 years. The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. The defendant shall cooperate in the collection of DNA as directed by the probation officer. Special Conditions of Supervision: -The defendant will register with the state sex offender registration agency in any state where he resides, where he is employed or works, and shall provide proof of registration to the probation officer. -The defendant shall participate in an outpatient substance abuse treatment program approved by the Probation Office, which may include testing to determine whether you have reverted to

		using drugs or alcohol. The defendant shall contribute to the costs of services rendered based on ability to pay and availability of third-party payment. The Court authorizes the release of available drug treatment evaluations and reports, including the presentence report, to the substance abuse treatment provider. -The defendant shall undergo a sex-offense-specific evaluation and participate in a sex offender treatment and/or outpatient mental health treatment program approved by the probation officer. The defendant shall abide by the rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph testing. The defendant shall waive confidentiality with respect to any records for mental health assessment and treatment imposed as a consequence of this judgment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant shall contribute to the costs of services rendered based on the ability to pay or

		availability of third party payment. The Court authorizes the release of available psychological and psychiatric evaluations and reports, including the presentence investigation report, to the sex offender treatment provider and/or the mental health treatment provider. -The defendant shall report to the nearest Probation Office within 72 hours of the judgment. -The defendant shall be supervised by the district of residence. -The fine is waived because of inability to pay. -The defendant will pay a special assessment in the amount of $100.00. ASSESSMENT: $100.00, due immediately. (Signed by Judge J. Paul Oetken on 6/16/2016)(bw) (Entered: 06/16/2016)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of June, two thousand seventeen.

PRESENT:

RICHARD C. WESLEY,
SUSAN L. CARNEY,
CHRISTOPHER F. DRONEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

No. 16-1829

HERMAN AVERY GUNDY, AKA HERMAN GRUNDY,

Defendant-Appellant.

FOR APPELLANT: SARAH BAUMGARTEL, Federal Defenders of New York, Inc., New York, NY.

FOR APPELLEE: EMIL J. BOVE III (Brendan F. Quigley, Brian R. Blais, *on the brief*), Assistant United States Attorneys, *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Oetken, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the June 16, 2016 judgment of the District Court is **AFFIRMED**.

Defendant-appellant Herman Gundy appeals his conviction and sentence, following a bench trial on stipulated facts, for one count of failing to register as a

sex offender after traveling in interstate commerce, in violation of the Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C. § 2250(a). We assume the parties' familiarity with the underlying facts and the procedural history of the case, to which we refer only as necessary to explain our decision to affirm.

While serving a federal sentence for violating Maryland Criminal Law § 3-306, Sexual Offense in the Second Degree, during his supervised release for a prior federal offense, Gundy was transferred from Maryland to a federal prison in Pennsylvania. *See United States v. Gundy*, 804 F.3d 140, 143 (2d Cir. 2015). As he approached the end of his federal sentence, Gundy authorized the Department of Justice to make arrangements for his move to community-based custody. He was ordered to be transferred to the Bronx Residential Re-Entry Center, a halfway house in New York, and he was granted a furlough to travel unescorted on a commercial bus on July 17, 2012, from Pennsylvania to the Bronx. Gundy arrived at the Re-Entry Center as planned, and, on August 27, 2012, was released from federal custody there to a private residence in the Bronx. Gundy did not register as a sex offender in either Maryland or New York, as state law required, and was arrested and charged under 18 U.S.C. § 2250. *Id.* at 144. After the District Court granted Gundy's motion to dismiss the prosecution for the absence of a trigger for SORNA's registration requirement, this Court reversed the dismissal and reinstated the indictment, holding that the requirement was triggered because Gundy was "required to register" under SORNA no later than August 1, 2008. *See id.* at 145.

Upon the indictment's reinstatement, Gundy renewed his motion to dismiss on the basis that the interstate travel requirement of the statute was not satisfied because he was still in custody when he traveled from Pennsylvania to the Bronx. The District Court denied the motion, holding that the statute did not include an exception to the interstate travel element based on a defendant's custodial status. The District Court also held that, even if the statute did include a voluntariness or *mens rea* requirement, the allegations of the indictment were sufficient for that issue to be resolved at trial.

A bench trial followed on stipulated facts. The District Court found that each element of the offense had been proven beyond a reasonable doubt, including the interstate travel element and any voluntariness or *mens rea* requirement that may apply, and thus found Gundy guilty of violating § 2250. Following a sentencing hearing, the District Court entered judgment imposing a sentence of time served and a five-year term of supervised release. Gundy now appeals from that judgment.

Section 2250(a) imposes criminal liability on anyone who (1) is required to register under SORNA; (2) travels in interstate or foreign commerce; and (3) knowingly fails to register or update a required registration. 18 U.S.C. § 2250(a). We held in our consideration of Gundy's earlier appeal that Gundy satisfies the first requirement. There is no dispute that he knowingly failed to register, thus satisfying the third requirement. On appeal, Gundy asks us to read in an exception to the second requirement, travel in interstate commerce, for a defendant who crosses state lines while in federal custody. He contends that

holding otherwise would violate the usual requirement of criminal law that criminal acts be committed voluntarily. The parties also dispute whether, on the stipulated facts and conclusions of the District Court following the bench trial, Gundy's travel from Pennsylvania to New York was voluntary.

We decline to reach Gundy's argument regarding the interpretation of § 2250(a).[1] Assuming *arguendo* that Gundy is correct and that the travel element contains an implicit voluntariness requirement, that requirement is easily met on the facts of this case. Although Gundy remained technically in federal custody when traveling to the halfway house in New York, the stipulated facts at trial are sufficient to support the District Court's finding that Gundy's travel was voluntary. On the basis of those facts, the District Court was free to conclude that Gundy made the trip in question willingly, as he authorized the initial transfer process and then traveled by bus to New York on his own recognizance. *See United States v. Pierce*, 224 F.3d 158, 164 (2d Cir. 2000) (noting that standard of review for sufficiency of the evidence is the same in a bench trial as a jury trial). We need not and do not reach the question of statutory interpretation because, even assuming Gundy is correct that

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[1] To the extent Gundy attempts to present his case as two separate arguments—one based on voluntariness, and one based on a lack of congressional "focus" on sex offenders in custody (supporting the creation of a *per se* custodial travel exemption)—we are unpersuaded. Gundy himself repeatedly blends these arguments, *see, e.g.*, Appellant's Br. 1, 11, and he provides us with no real reason to look to look past the statute's text to other expressions of congressional intent except for his stated concern about the voluntariness of custodial travel.

interstate travel in § 2250(a) is limited to voluntary travel, the District Court reasonably found that the travel here was voluntary.

* * *

We have considered Gundy's remaining arguments and find them to be without merit.[2] Accordingly, we **AFFIRM** the judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

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[2] This includes Gundy's argument—foreclosed by *United States v. Guzman*, 591 F.3d 83, 91-93 (2d Cir. 2010), and made only for preservation purposes—that SORNA violates antidelegation principles.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2014

(Argued: October 28, 2014
Decided: September 14, 2015)

Docket No. 13-3679-cr

UNITED STATES OF AMERICA,

Appellant,

- v. -

HERMAN AVERY GUNDY, A/K/A HERMAN GRUNDY,

Defendant-Appellee.

Before:

KATZMANN, *Chief Judge*, HALL and CARNEY, *Circuit Judges*.

BRENDAN F. QUIGLEY, Assistant United States Attorney (Emil J. Bove III and Justin Anderson, Assistant United States Attorneys, *on the brief*), *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, NY, *for Appellant*.

SARAH BAUMGARTEL (Yuanchung Lee, *on the brief*), Federal Defenders of New York, Inc., Appeals Bureau, New York, NY, *for Defendant-Appellee*.

OPINION

SUSAN L. CARNEY, *Circuit Judge*:

The United States appeals from orders of the United States District Court for the Southern District of New York (J. Paul Oetken, *Judge*) dismissing the January 7, 2013 Indictment against Defendant–Appellee Herman Avery Gundy and denying its motion for reconsideration of the dismissal. The Indictment charged Gundy with a violation of the Sex Offender Registration and Notification Act ("SORNA" or the "Act"), which makes it a federal crime for a person who (1) "is required to register under [SORNA]," and (2) "travels in interstate or foreign commerce," to then (3) "knowingly fail[ ] to register or update a registration as required by [SORNA]." 18 U.S.C. § 2250(a); *see Carr v. United States*, 560 U.S. 438, 446 (2010) (explaining that the elements must be satisfied in sequence). This case requires us to decide when a person is "required to register" within the meaning of SORNA. The District Court, reasoning that Gundy was not "required to register" until shortly before his release from custody and thus after the interstate travel charged in the Indictment, held that Gundy could not have violated § 2250(a). Because we disagree with the District Court's conclusion that Gundy was not "required to register" until after the charged interstate travel, we REVERSE the District Court's order dismissing the Indictment and REMAND the cause to the District Court for reinstatement of the Indictment and for further proceedings.

BACKGROUND

A. The Sex Offender Registration and Notification Act

The federal government has set national standards for sex offender registration and notification since 1994, when it first required states to adopt registration laws as a condition for receiving federal law enforcement funds. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103–322, § 170101, 108 Stat. 2038, 2038–42 (1994) (repealed 2006); *see also* Final Guidelines, 73 Fed. Reg. 38,030 (July 2, 2008). The Sex Offender Registration and Notification Act, which was enacted on July 27, 2006, *see* Pub. L. No. 109–248, 120 Stat. 590, was designed to improve the existing system by "mak[ing] more uniform what had," until that point, "remained a patchwork of federal and 50 individual state registration systems, with loopholes and deficiencies that had resulted in an estimated 100,000 sex offenders becoming missing or lost." *United States v. Kebodeaux*, - — U.S. ——, 133 S. Ct. 2496, 2505 (2013) (citations and internal quotation marks omitted). Among other things, the Act created the National Sex Offender Registry, *see* 42 U.S.C. § 16919; imposed new guidelines on the states for the maintenance of registries, *see id.* §§ 16912, 16914; and imposed new registration requirements on offenders, *see id.* §§ 16913–16—while repealing much of the then-existing registration regime, *see id.* §§ 14071–73 (2006).

To promote offenders' compliance with the new registration requirements, SORNA made it a federal crime to fail to register or update one's registration as

required by the Act under certain circumstances. In relevant part, the criminal law provides as follows:

> (a) In general.—Whoever—
>
> (1) is required to register under [SORNA];
>
> (2) ...
>
> (B) travels in interstate or foreign commerce ... and
>
> (3) knowingly fails to register or update a registration as required by [SORNA];
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2250.[1]

The particular civil registration requirements upon which criminal liability under § 2250(a) depends are set out at 42 U.S.C. § 16913. *See Reynolds v.*

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[1] Section 2250(a) provides in full:

> (a) In general.—Whoever—
>
> (1) is required to register under the Sex Offender Registration and Notification Act;
>
> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

United States, ___ U.S. ___, 132 S.Ct. 975, 978–79, (2012); *see also United States v. Guzman*, 591 F.3d 83, 90 (2d Cir. 2010) (explaining that, "without § 16913, § 2250 has no substance" (internal quotation marks omitted)). Subsection (a) of § 16913 contains the core registration mandate. It provides:

> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

42 U.S.C. § 16913(a). Subsection (b) governs the timing of "Initial registration," stipulating that "[t]he sex offender shall initially register—(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." *Id.* § 16913(b). Subsection (c) sets the terms under which a sex offender must update his or her registration, requiring a sex offender to report within three business days—in person and in at least one registration jurisdiction—any "change of name, residence, employment, or student status." *Id.* § 16913(c).

The duration of these registration requirements is specified in 42 U.S.C. § 16915: The "full registration period" is fifteen years for a statutorily defined "tier I" sex offender, twenty-five years for a "tier II" sex

offender, and the life of the offender for a "tier III" offender. 42 U.S.C. § 16915(a); *see also id.* § 16911(2)-(4) (defining tiers of sex offenders). The period of required registration is reduced for those offenders who maintain "clean record[s]" for a sufficient number of years. *Id.* § 16915(b).

Rather than determine by statute what retroactive application to give the registration requirements, Congress vested in the Attorney General "the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of [SORNA] or its implementation in a particular jurisdiction." 42 U.S.C. § 16913(d). Since SORNA's enactment, the Attorney General—in interim and final rules and proposed and final guidelines published between 2007 and 2010[2]—has specified that the Act's requirements apply to all sex offenders whose convictions predate the enactment of the Act, even in jurisdictions that have yet to

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[2] *See* Interim Rule, 72 Fed. Reg. 8894, 8896 (Feb. 28, 2007) ("SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted."); Proposed Guidelines, 72 Fed. Reg. 30,210, 30,212 (May 30, 2007) ("SORNA's requirements apply to all sex offenders, including those whose convictions predate the enactment of the Act."); Final Guidelines, 73 Fed. Reg. 38,030, 38,063 (July 2, 2008) ("SORNA applies to all sex offenders, including those convicted of their registration offenses prior to the enactment of SORNA or prior to particular jurisdictions' incorporation of the SORNA requirements into their programs."); Final Rule, 75 Fed. Reg. 81,849, 81,850 (Dec. 29, 2010) (finalizing the interim rule "to eliminate any possible uncertainty or dispute concerning the scope of SORNA's application").

implement it.[3] We have held that SORNA became applicable to pre-Act offenders at the latest when the Attorney General's final guidelines took effect. *See United States v. Lott*, 750 F.3d 214, 217 (2d Cir. 2014). This occurred on August 1, 2008, thirty days after the final guidelines were published. *See* 5 U.S.C. § 553(d) (providing that, subject to certain exceptions not applicable here, "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date").[4]

B. Factual Basis for Gundy's Indictment

In October 2005, Herman Gundy was convicted of violating Maryland Criminal Law § 3–306, Sexual Offense in the Second Degree. He was sentenced to twenty years' imprisonment (with ten years

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[3] SORNA does not require registration, however, by offenders who "have been in the community for a greater amount of time than the registration period required by SORNA." 73 Fed. Reg. at 38,046–47.

[4] The guidelines themselves identify their "Effective Date" as July 2, 2008, the date they were published in the Federal Register. *See* 73 Fed. Reg. at 38,030. But 5 U.S.C. § 553(d) creates an exception to the thirty-day prior publication requirement only for "(1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule." None of these exceptions applies: The final guidelines do not grant or recognize an exemption or relieve a restriction. They are substantive, not interpretive, rules. *See Lott*, 750 F.3d at 217-19. And the Attorney General "provided no statement of reasons to establish 'good cause.'" *United States v. Utesch*, 596 F.3d 302, 311 n. 8 (6th Cir. 2010). Indeed, in these proceedings, the government itself has conceded that the effective date of the final guidelines was August 1, 2008. *See* Appellant's Br. 20 n.4.

suspended), to be followed by five years' probation. When he committed the offense that was the basis for his Maryland conviction, Gundy was already subject to the supervision of the United States District Court for the District of Maryland in relation to an earlier federal conviction. Committing the Maryland offense violated the terms of his federal supervised release. In March 2006, Gundy pleaded guilty to the supervised release violation and was sentenced to twenty-four months' imprisonment for that offense, to be served consecutively to the Maryland sentence.

About four and a half years later, in November 2010, Gundy was transferred from the custody of the State of Maryland to the custody of the Federal Bureau of Prisons to serve his federal sentence for violating his supervised release. But he remained in Maryland, apparently still in a state facility notwithstanding his federal custody.

Federal authorities eventually transferred Gundy to FCI Schuylkill in Minersville, Pennsylvania. In March 2012, toward the end of his federal sentence and in preparation for his release, Gundy signed a "Community Based Program Agreement" authorizing the Department of Justice to make arrangements for his transition into community-based custody. Three months later, Gundy was ordered to be transferred to the Bronx Residential Re–Entry Center, a halfway house in New York. At his request, Gundy was granted a furlough to travel, unescorted, on July 17, 2012, from FCI Schuylkill to the Bronx. In his furlough application, Gundy acknowledged, among other things:

> I understand that if approved, I am authorized to be only in the area of the destination shown above and at ordinary stopovers or points on a direct route to or from that destination. I understand that my furlough only extends the limits of my confinement and that I remain in the custody of the Attorney General of the United States. If I fail to remain within the extended limits of this confinement, it shall be deemed as escape from the custody of the Attorney General . . . .

Ex. H to Decl. of Assistant U.S. Att'y Emil J. Bove III.

Gundy traveled from FCI Schuylkill to the Bronx Residential Re-Entry Center on July 17 as planned. On August 27, 2012, after completing his stay in the halfway house, Gundy was released from federal custody to a residence in the Bronx.

The government contends that, contrary to SORNA's requirements, Gundy registered in neither Maryland nor New York. On January 7, 2013, a grand jury returned an Indictment against Gundy in the United States District Court for the Southern District of New York charging him, under 18 U.S.C. § 2250, with being required to register under SORNA; traveling interstate from Pennsylvania to New York; and then failing to register as required.

C. District Court Proceedings

In March 2013, Gundy moved in the District Court to dismiss the Indictment for failure to state an offense. *See* Fed.R.Crim.P. 12(b)(3)(B)(v). Gundy argued principally that he was required to register only after the alleged interstate travel between

Pennsylvania and New York, and thus could not have violated § 2250(a), the elements of which must be satisfied sequentially. The District Court agreed with Gundy and granted his motion.

In granting the motion, the court rejected the government's contention that Gundy, who was convicted of a covered crime before SORNA's enactment in 2006, was "required to register" as soon as SORNA became retroactive. The court interpreted 42 U.S.C. § 16913(b)(1)—which provides that a "sex offender shall initially register ... before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement"—as demonstrating that Gundy was "required to register" under 18 U.S.C. § 2250(a)(1) only "shortly before he was released from custody in New York," and after he had traveled interstate, *United States v. Gundy*, No. 13 Crim. 8 (JPO), 2013 WL 2247147, at *6, *13 (S.D.N.Y. May 22, 2013).

Accounting for the fact that the sentence Gundy was serving immediately before his release in New York was for violating the terms of his federal supervised release, and not for the Maryland sexual assault, the District Court held that the federal sentence was also "a sentence of imprisonment with respect to" Gundy's sex offense. *See id.* at *11-12. In a motion for reconsideration, the government argued for the first time that Gundy was nevertheless required to register at the latest before he completed his Maryland sentence pursuant to 42 U.S.C. § 16913(b)(1), because the language of the statute states that a sex offender must register "before completing *a* sentence of imprisonment," in the singular (emphasis added).

The District Court denied the government's motion, concluding that this argument was waived, but also rejecting it on the merits due to considerations of "statutory purpose and the rule of lenity." *United States v. Gundy,* No. 13 Crim. 8 (JPO), 2013 WL 4838845, at *2-3, *6 (S.D.N.Y. Sept. 11, 2013). The government now appeals the court's orders.

DISCUSSION

Since the Indictment's dismissal raises questions of law, our review is *de novo. See United States v. Alfonso,* 143 F.3d 772, 775 (2d Cir. 1998).

The government argues that the Indictment should be reinstated because Gundy was "required to register" under SORNA from the moment he was designated a "sex offender" under the Act—at the latest, August 1, 2008, when the Attorney General's final guidelines on retroactivity became effective. According to the government, § 16913(b)—upon which the District Court principally relied—"does not purport to determine when an individual incurs an obligation to register under SORNA, [but] only when there has been a failure to make an initial registration as required by the statute." Appellant's Br. 21. The government argues, in the alternative, that even accepting Gundy's contrary contention that § 16913(b) specifies when a sex offender first is required to register, Gundy would have been required to register at the latest as of November 30, 2010, when he was released from Maryland custody into the custody of the Federal Bureau of Prisons. Under either interpretation, Gundy became a person "required to register" before his July 17, 2012 trip from Pennsylvania to New York.

We agree with the government's first argument that Gundy was a person "required to register" from the time SORNA became retroactive. A person is "required to register" under SORNA "[o]nce [that] person becomes subject to SORNA's registration requirements." *Carr*, 560 U.S. at 447. For Gundy, who was convicted of a sex offense in 2005, before SORNA's July 2006 effective date, the registration requirements attached at the latest on August 1, 2008, the effective date of the Attorney General's final guidelines, *see Lott*, 750 F.3d at 217; 5 U.S.C. § 553(d).

Gundy contends that he was not subject to SORNA's registration requirements at all until shortly before his 2012 release from federal custody. In urging this position, he relies principally on § 16913(b), which provides (as relevant here) that a "sex offender shall initially register ... before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." 42 U.S.C. § 16913(b)(1). Gundy points to subsection (b)'s reference to "initial" registration and reasons that a person cannot be "required to register" before that person is required *initially* to register.

Although § 16913(b) undoubtedly regulates initial registration, we disagree that this means that § 16913(b) also regulates when registration requirements attach. It is our view that § 16913(b) is most naturally read to set deadlines for initial registration, not to establish the conditions that make registration mandatory. The provision is worded in terms of cutoff dates rather than beginning points: Thus, subsections (b)(1) and (2) direct that an offender sentenced to a term of imprisonment must initially register "*before* completing a sentence of

imprisonment with respect to the offense giving rise to the registration requirement," and that an offender not sentenced to a term of imprisonment must register "*not later than 3 business days after* being sentenced for that offense." 42 U.S.C. § 16913(b)(1), (2) (emphases added).

Gundy does not dispute this reading of the statute. Instead, he argues that there can be no "require[ment] to register" until an offender has reached a registration deadline. But this argument gives insufficient weight to the fact that § 2250(a) treats being "required to register" and "fail[ing] to register or update a registration as required" as separate and distinct elements of the criminal offense. 18 U.S.C. § 2250(a)(1), (3). The temporal relationship between these elements—the first necessarily is satisfied before the second, *see Carr*, 560 U.S. at 446—establishes that a person can be "subject to SORNA's registration requirements," *id.* at 447, before he or she is subject to immediate sanction for "fail[ing] to register," 18 U.S.C. § 2250(a)(3).[5] Section 16913(b) does not regulate when registration requirements attach.

Gundy argues, *inter alia*, that the government's interpretation of when registration requirements

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[5] Gundy's argument is also in tension with his assertion that he was required to register "shortly before" his release from custody. Were the government "simply wrong in asserting that 'a person can be required to register under a statute for a period of time prior to that person's deadline for completing that registration process,'" Appellee's Br. 24 (quoting Appellant's Br. 23), there would be no period of time before the deadline—however "short"—during which a person would be subject to a registration obligation.

attach undermines SORNA's purposes, contradicts Supreme Court precedent, and ignores other provisions of the Act. We find none of his arguments persuasive.

SORNA was enacted in part "to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks." *Carr*, 560 U.S. at 455. According to Gundy, permitting sex offenders to satisfy their initial registration requirements by initially registering long before their release would, contrary to this purpose, enable "offenders ... easily [to] abscond following their release from prison, before they had registered their community address." Appellee's Br. 28. This argument ignores that a sex offender, having initially registered, remains subject to SORNA's registration requirements and is required "not later than 3 business days" after a change in residence to update his or her registration information. 42 U.S.C. § 16913(c). Such an offender who initially registers and is then released from custody is in a position similar to that of a sex offender who is not sentenced to a term of imprisonment and must initially register "not later than 3 business days after being sentenced for that offense." *Id.* § 16913(b)(2). In either case, the sex offender is "required to register"; should he or she leave the state of conviction and thereafter fail to register, a federal criminal penalty may be imposed. In contrast, were the Court to adopt Gundy's position that a sex offender is "required to register" only upon the arrival of the offender's initial registration deadline, an offender not sentenced to a prison term—and thus, in Gundy's view, "required to register" 3 business days after sentencing—would not be subject to a federal criminal

penalty if he or she left the state on the day of sentencing and thereafter failed to register. The travel would have occurred before the offender was "required to register," precluding prosecution. *See Carr,* 560 U.S. at 446. This result certainly would run counter to SORNA's purpose.

Gundy's attempt to use *Carr v. United States,* 560 U.S. 438 (2010), to challenge the government's position is not persuasive. In *Carr,* the Supreme Court faced the question whether a defendant who had both been convicted of a sex offense and traveled interstate before SORNA's enactment could be convicted under § 2250(a) for failure to register. *See id.* at 442. S.Ct. The Court concluded that he could not. *See id.* at 458. In reaching this conclusion, the Court agreed with the defendant that the three elements of the crime necessarily would have had to occur after SORNA's effective date, rejecting the suggestion that being "required to register under [SORNA]" was merely "shorthand" for the status of having been convicted of a sex offense covered by SORNA. *Id.* at 446-47 (internal quotation marks omitted).

Gundy charges that the government's position here runs afoul of the *Carr* Court's holding that being "required to register" under SORNA "denotes a more specific meaning than being among a class of sex offenders, or having a prior sex offense conviction." Appellee's Br. 20. But the government's position, and the one we adopt here, is not that the set of persons who are "required to register" is equivalent to the set of persons who been convicted of a sex offense. Rather, it is that a sex offender is "required to register" once he or she is "subject to" SORNA's registration requirements. This can occur only after SORNA's

effective date, and after SORNA has been made applicable to that person. Gundy, for example, was convicted in 2005, before SORNA's effective date, and therefore was "required to register" not upon his conviction, but only once SORNA was made retroactively applicable to him. Further, the period of required registration does not necessarily persist indefinitely. A person for whom the statutorily prescribed registration period is complete is no longer subject to SORNA's registration requirements, even as he or she remains among the class of statutorily defined sex offenders. *See* 42 U.S.C. § 16915; 73 Fed. Reg. at 38,046–47.

Gundy points to the fact that the state has a duty to inform a sex offender of the registration requirements only "shortly before" his or her release from custody, 42 U.S.C. § 16917(a), as another reason to conclude that Gundy could not have been a person "required to register" until shortly before his release from federal custody consecutive to his state custody. But we have emphasized that SORNA's requirements for the states and for sex offenders are not necessarily interdependent: In *United States v. Hester,* 589 F.3d 86 (2d Cir. 2009) (per curiam), we held that the defendant's duty to register under SORNA was dependent neither on his actual knowledge of SORNA's requirements nor on the state's implementation of SORNA, *see id.* at 91-93; the application of the registration requirements cited in § 2250(a)(1) did not hinge on whether the state had provided notice of those requirements, *see id.* at 92. And in any case, the timing of the state's duty to provide notice is not random: An offender who is "required to register" under SORNA but does not

register is not vulnerable to any punishment until after the time at which the state incurs a duty to provide notice. This is because an offender cannot have "fail[ed] to" satisfy any SORNA requirement applicable to him or her until the deadline for satisfying that requirement has passed; for a sex offender sentenced to a term of imprisonment, the initial registration deadline is when he or she "complet[es] a sentence of imprisonment with respect to the offense giving rise to the registration requirement," 42 U.S.C. § 16913(b)(1).[6] That Congress required states to provide notice to sex offenders only shortly before their release from custody fails to demonstrate that Congress did not intend for sex offenders to be persons "required to register" from an earlier stage.

Further, any suggestion that Gundy could not have been a person "required to register" beginning in 2008 because registration would have been impossible for him to accomplish while in custody must be rejected. The statute expressly requires an offender sentenced to imprisonment to initially register while still in custody. *See* 42 U.S.C. § 16913(b)(1) (requiring a sex offender to register "before completing a sentence of imprisonment"). And the nature of the registration information that a sex offender must provide accounts for the possibility that a sex offender may not have a current place of employment or permanent residence. For example, § 16914(a) requires a sex offender to

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[6] Indeed, any offender designated as such based on a state law conviction does not violate § 2250(a)—and is not subject to *federal* criminal sanction—unless he or she fails to register after traveling interstate.

provide the name and address of any place where the sex offender "resides *or will reside*," or "is . . . *or will be*" an employee or student. *Id.* § 16914(a)(3)-(5) (emphases added). Notably, it is only after initial registration, to "[k]eep[ ] the registration current," that a sex offender must "appear in person" to provide information, *id.* § 16913(c); and the particular requirement to keep one's registration current in this way does not apply to sex offenders during any period of custody or civil commitment, *see id.* § 16915(a); 73 Fed. Reg. at 38,068.

In sum, Gundy was a person "required to register" under SORNA beginning at the latest on August 1, 2008, the effective date of the Attorney General's final guidelines. This date arrived well before his alleged travel from Pennsylvania to New York. The District Court thus erred in concluding that Gundy became a person "required to register" under SORNA only after traveling interstate.

Gundy urges us, to the extent we disagree with the District Court, to affirm the court's dismissal order on the alternative ground that the travel charged in the Indictment does not amount to "interstate travel" within the meaning of § 2250(a)(2)(B). Gundy notes that by virtue of his one-day travel agreement with the federal government, he remained in the custody of the Federal Bureau of Prisons when he traveled from Pennsylvania to New York to take up his residence in the halfway house. As a result, he argues, his travel fell outside the purview of § 2250(a)(2)(B). Gundy raised this issue before the District Court, but the District Court did not reach it. We leave it to the court on remand to decide in the first instance whether

dismissal of the Indictment is warranted on this other ground.

CONCLUSION

For the reasons above, we REVERSE the District Court's order dismissing the Indictment. We REMAND the cause to the District Court for reinstatement of the Indictment and for further proceedings consistent this opinion. Gundy's appeal from the District Court's order denying reconsideration is moot.

Approved: /s/
EMIL J. Bove III
Assistant United States Attorney

Before: HONORABLE GABRIEL W. GORENSTEIN
United States Magistrate Judge
Southern District of New York

UNITED STATES OF AMERICA - v. - HERMAN AVERY GUNDY, a/k/a "Herman Grundy," Defendant.	COMPLAINT Violation of 18 U.S.C. § 2250 COUNTY OF OFFENSE: NEW YORK

SOUTHERN DISTRICT OF NEW YORK, ss.:

NICHOLAS RICIGLIANO, being duly sworn, deposes and says that he is a Senior Inspector with the United States Marshals Service ("USMS"), and charges as follows:

COUNT ONE

From at least in or about July 2012, up to and including in or about October 2012, in the Southern District of New York and elsewhere, HERMAN AVERY GUNDY, a/k/a "Herman Grundy," the defendant, being an individual required to register under the Sex Offender Registration and Notification Act, who did travel in interstate commerce, knowingly did fail to register and update a registration as required by the Sex Offender Registration and Notification Act, to wit, GUNDY traveled from Pennsylvania to New York and thereafter resided in

New York without registering as a sex offender in New York.

(Title 18, United States Code, Section 2250.)

The bases for my knowledge and for the foregoing charge are, in part, as follows:

1. I am a Senior Inspector with the USMS. I am currently the Sex Offender Investigations Coordinator for the Regional Fugitive Task Force.

2. I have been personally involved in the investigation of this matter. This affidavit is based upon my conversations with other law enforcement agents and witnesses, my examination of reports and records, and my personal participation in the investigation. Because this affidavit is being submitted for the limited purpose of establishing probable cause, it does not include all the facts that I have learned during the course of my investigation. Where the contents of documents and the actions, statements, and conversations of others are reported herein, they are reported in substance and in part, except where otherwise indicated.

3. Based on my review of records relating to HERMAN AVERY GUNDY, a/k/a "Herman Grundy," the defendant, I have learned the following:

a. On or about July 11, 1994, GUNDY pleaded guilty in the Eastern District of Pennsylvania to one count of conspiracy to distribute cocaine base, in violation of Title 21, United States Code, Section 846 (the "Federal Conviction"). On or about February 5, 1996, GUNDY was sentenced based on this conviction principally to five years' imprisonment and five years

of supervised release. *See United States v. Herman Grundy, a/k/a "Gundy,"* No. 94 Cr. 117 (E.D. Pa.).

b. In or about the summer of 2004, jurisdiction over GUNDY's supervised release relating to the Federal Conviction was transferred from the Eastern District of Pennsylvania to the District of Maryland. *See United States v. Herman Grundy, a/k/a "Gundy,"* No . 04 Cr. 305 (D. Md.).

c. On or about October 3, 2005, GUNDY pleaded guilty in the Circuit Court for Washington County in Hagerstown, Maryland of Sexual Offense in the Second Degree, in violation of Maryland Criminal Law Section 3-306 (the "Maryland Conviction"). On the same day that GUNDY pleaded guilty, he was sentenced to 20 years' imprisonment (with 10 years of that sentence suspended) and five years of probation.

d. The October 3, 2005 judgment resulting from GUNDY's Maryland Conviction states, in pertinent part:

> As defined in Criminal Procedure Article, Section 11-701, and subject to [the] requirements of Section 11-701 to Section 11-721[,] Defendant to be registered as a . . . CHILD SEXUAL OFFENDER.

e. The "Probation/Supervision Order" entered in connection with GUNDY's Maryland Conviction states, as a "Special Condition[ ]" of GUNDY's probation, that he was to "Register . . . as [a] child sexual offender . . . under the provisions of Criminal Procedure Article Title 11, Subtitle 7." In or about October 2005, GUNDY signed a "Consent" at the

bottom of the "Probation/Supervision Order," which states, in pertinent part:

> I have read, or have had read to me, the above conditions of probation. I understand these conditions and agree to follow them.

f. On or about March 23, 2006, GUNDY was sentenced in the District of Maryland to 24 months' imprisonment for violating the terms of his supervised release in connection with the Federal Conviction. *See* Judgment in a Criminal Case, *United States v. Herman Grundy, a/k/a "Gundy,"* No. 04 Cr. 305 (D. Md. Mar. 24, 2006) (doc. no. 15). The violation of supervised release proceeding was based, in part, on GUNDY's Maryland Conviction.

g. On or about July 6, 2011, after completing the term of incarceration to which GUNDY was sentenced in connection with the Maryland Conviction, GUNDY was taken into the custody of the Bureau of Prisons ("BOP") and incarcerated at Federal Correctional Institution – Schuylkill ("FCI Schuylkill") in Minersville, Pennsylvania.

h. On or about July 17, 2012, GUNDY was released from FCI Schuylkill in Pennsylvania, and he traveled via mass transit to a federal halfway house in the Bronx, New York (the "Bronx Halfway House").

i. On or about August 27, 2012, GUNDY was released from the Brown Halfway House.

j. On or about September 13, 2012, the State of Maryland issued a warrant for GUNDY's arrest based on violations of the parole conditions resulting from GUNDY's Maryland Conviction (the "Maryland Warrant").

k. On or about October 24, 2012, pursuant to the Maryland Warrant, law enforcement personnel took GUNDY into custody in or around an apartment in the Bronx, New York (the "Bronx Apartment").

l. GUNDY is currently incarcerated in Maryland.

4. I have learned the following from the Case Manager at FCI Schuylkill who worked with HERMAN AVERY GUNDY, a/k/a "Herman Grundy," the defendant, while GUNDY was incarcerated at that facility:

a. GUNDY's Case Manager advised GUNDY that he was required to register as a sex offender in any state in which he resided after being released from FCI Schuylkill.

b. GUNDY reviewed and completed parts of a BOP form titled "BP-S648.051 Sex Offender Registration and Treatment Notification" (the "BOP Form"). On or about August 1, 2011, GUNDY signed Section A of the BOP Form, titled "INITIAL CLASSIFICATION." Section A of the BOP Form indicates that GUNDY has a "Prior conviction of [a] sexual offense" and states, in pertinent part:

> This is to notify you of your Public Safety Factor – Sex Offender classification pursuant to Bureau of Prisons Program Statement Security Designation and Custody Classification Manual.

c. On or about June 8, 2012, the Case Manager read to GUNDY Section B of the BOP Form, titled "FINAL PROGRAM REVIEW," which GUNDY refused to sign. Section B of the BOP Form indicates

that GUNDY has a "Prior conviction of [a] sexual offense" and states, in pertinent part :

> You are subject to registration as a sex offender in any state in which you reside, are employed, carry on a vocation, or are a student.

5. I have learned the following from a witness ("Witness-1") found in the Bronx Apartment where HERMAN AVERY GUNDY, a/k/a "Herman Grundy," the defendant, was taken into custody on or about October 24, 2012:

a. Witness-1 has lived in the Bronx Apartment since approximately 1991.

b. GUNDY moved into the Bronx Apartment in or about August 2012.

6. Historical cell site records relating to a cellular telephone found in the possession of HERMAN AVERY GUNDY, a/k/a "Herman Grundy," the defendant, when he was taken into custody on or about October 24, 2012, indicate that the cellular telephone was used consistently in the Southern District of New York between on or about September 24, 2012, and on or about October 22, 2012.

7. At my request, a clerk at the New York State Division of Criminal Justice Services, which maintains New York's Sex Offender Registry, performed a search of the Division's records. He found no records relating to a sex offender registration by HERMAN AVERY GUNDY, a/k/a "Herman Grundy," the defendant.

WHEREFORE, deponent prays that an arrest warrant be issued for HERMAN AVERY GUNDY,

a/k/a "Herman Grundy," the defendant, and that he be arrested and imprisoned, or bailed, as the case may be.

/s/
NICHOLAS RICIGLIANO
Senior Inspector
United States Marshals Service

Sworn to before me this
3rd day of December, 2012

/s/
HONORABLE GABRIEL W. GORENSTEIN
United States Magistrate Judge
Southern District of New York

JUDGE OETKEN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEAR YORK

UNITED STATES OF AMERICA - v. - HERMAN AVERY GUNDY, a/k/a "Herman Grundy," Defendant.	13 CRIM008 **INDICTMENT** Cr. USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC#: DATE FILED: JAN 07 2013

COUNT ONE

The Grand Jury charges:

From at least in or about August 2012, up to and including in or about October 2012, in the Southern District of New York and elsewhere, HERMAN AVERY GUNDY a/k/a "Herman Grundy," the defendant, being an individual required to register under the Sex Offender Registration and Notification Act, who did travel in interstate commerce, willfully and knowingly did fail to register and update a registration as required by the Sex Offender Registration and Notification Act, to wit, GUNDY traveled from Pennsylvania to New York and thereafter resided in New York without registering as a sex offender in New York.

(Title 18, United States Code, Section 2250.)

/s/ 1/7/13	/s/
FOREPERSON	PREET BHARARA United States Attorney

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, -against- HERMAN AVERY GUNDY, Defendant.	13 Crim. 8 (JPO) **OPINION AND ORDER**

J. PAUL OETKEN, District Judge:

Defendant Herman Avery Gundy was charged with one count of failing to register as a sex offender under the Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C. § 2250. On May 22, 2013, this Court granted Gundy's motion to dismiss the indictment, holding that Gundy was not subject to SORNA's registration requirements at the time of the interstate travel alleged by the Government. *United States v. Gundy*, No. 13 Crim. 8, 2013 WL 2247147 (S.D.N.Y. May 22, 2013) ("the Opinion"). Advancing new arguments, the Government now seeks reconsideration of the Opinion. Though responsive to some of the concerns addressed in the Opinion, these arguments do not succeed. For the reasons that follow, the motion for reconsideration is denied.

I. Legal Standard

"A motion for reconsideration is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Drapkin v. Mafco Consol. Group, Inc.*, 818 F. Supp. 2d 678, 695 (S.D.N.Y. 2011) (quotation marks and citation omitted). Accordingly, "[t]he threshold for

prevailing on a motion for reconsideration is high." *Nakshin v. Holder*, 360 F. App'x 192, 193 (2d Cir. 2010); *see Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) ("The standard for granting such a motion is strict."). "Although the federal and local rules of criminal procedure do not specifically provide for motions for reconsideration, courts in this district have applied Local Civil Rule 6.3 in criminal cases." *United States v. Peterson*, No. 12 Crim. 409, 2012 WL 5177526, at *1 (S.D.N.Y. Oct. 19, 2012).

II. Discussion[1]

The Supreme Court has held that a person commits a violation of § 2250 only if he (1) is "required to register under [SORNA]"; (2) *subsequently* "travels in interstate or foreign commerce"; and (3) *subsequently* "knowingly fails to register . . . ." 18 U.S.C. § 2250; *see Gundy*, 2013 WL 2247147, at *3 (citing *Carr v. United States*, 560 U.S. 438 (2010)). In the Opinion, this Court concluded that the first element was not met until *after* Gundy traveled in interstate commerce. This is because, as the Court explained: (1) Gundy's duty to "initially register" under 18 U.S.C. § 16913 arose just before completion of "a sentence of imprisonment with respect to the offense giving rise to the registration requirement"; (2) Gundy's federal sentence for violation of supervised release ("VOSR") based on his Maryland conviction—which immediately followed his sentence on the Maryland conviction itself—was "a sentence of imprisonment with respect to the offense giving rise to the registration requirement" (namely, the Maryland

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[1] Familiarity with the Opinion and all other facts relevant to the case is presumed.

sex offense); and (3) Gundy did not complete that federal sentence until *after* he traveled in interstate commerce. *See Gundy*, 2013 WL 2247147, at *4-13.

A.

The Government's request for reconsideration opens with an argument that it did not advance in its original brief, at oral argument, or in its post-argument brief. This argument focuses on the third word of 18 U.S.C. § 16913(b)(1): "before completing *a* sentence of imprisonment with respect to the offense giving rise to the registration requirement." (emphasis added). In the Government's view, that single word controls this case: Because the sentence for his Maryland conviction was "a sentence of imprisonment," and because the statute refers to "a" sentence rather than "any" or "all" sentences, Gundy's duty to register attached on or before November 30, 2010—the date on which he completed the sentence for his Maryland conviction and thus, by implication, the date before which he was required to initially register. *See* § 16913 (b)(1). This is so, the Government argues, because he literally completed "*a* sentence of imprisonment with respect to the [sex] offense" on that date—even though he was not released and was immediately transferred to federal custody to begin serving *another* "sentence of imprisonment with respect to the [sex] offense."

This argument, although presenting a stronger textual basis for the Government's position than its previous arguments, must be rejected for several reasons.

First, motions for reconsideration are not the appropriate mechanism for advancing purportedly

dispositive arguments for the first time. As the Second Circuit has emphasized, "[g]enerally, motions for reconsideration are not granted unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Cioce v. County of Westchester*, 128 F. App'x 181, 185 (2d Cir. 2005). Accordingly, "a party may not advance new facts, issues, or arguments not previously presented to the Court." *Polsby v. St. Martin's Press, Inc.*, No. 97 Civ. 690, 2000 WL 98057, at *1 (S.D.N.Y. Jan. 18, 2000) (citation omitted). "Simply put, courts do not tolerate such efforts to obtain a second bite at the apple." *Goonan v. Fed. Reserve Bank of New York*, No. 12 Civ. 3859, 2013 WL 1386933, at *2 (S.D.N.Y. Apr. 5, 2013). By waiting until this late stage in the case, and failing to identify any new decision or data in support of its plain language interpretation, the Government has waived this argument.

Second, even on its own terms, the Government's argument does not rid § 16913(b)(1) of the ambiguity that required invocation of statutory purpose and the rule of lenity.

"As in any statutory construction case," analysis begins with the statutory text and "proceed[s] from the understanding that [u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (internal quotation marks and citations omitted). "The meaning of a word [or phrase] cannot be determined in isolation, but must be drawn from the context in which it is used.'" *United States v. Torres*, 703 F.3d 194, 199 (2d Cir.

2012) (quoting *In re Sept. 11 Prop. Damage Litig.*, 650 F.3d 145, 155 (2d Cir. 2011)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law* 168 (2012) (noting that "statutory construction is a holistic endeavor"). "If the text of a statute [remains] ambiguous, then [the Court] must construct an interpretation consistent with the primary purpose of the statute." *United States v. Ripa*, 323 F.3d 73, 81 (2d Cir. 2003).

Section 16913(b) provides that a sex offender shall initially register "before completing a sentence of imprisonment . . . ." While the Government sees perfect clarity in this sentence, § 16913(b)(1) remains ambiguous in a crucial respect: by using the indefinite article to modify "sentence of imprisonment," Congress failed to distinguish between "any" and "a single." This distinction makes all the difference to Gundy.

As a matter of plain language, the Government's reading is certainly a legitimate one. Consider the sentence: "You must apply for kindergarten before completing a year of preschool." It is fairly obvious from the context of the sentence that "*a* year of preschool" is intended to mean "*a single* year of preschool." But consider the following directive from a doctor: "You must take one of these pills before finishing a meal" (or "Take one pill with a meal"). This is probably better read as meaning "before finishing *any* meal" (or "with *any* meal"). And consider the sentence: "You must stay out of the swimming pool until 15 minutes after eating a candy bar." Given the context, the better reading of this sentence is that it refers to *any* candy bar—and that if someone ate three candy bars consecutively, the 15-minute moratorium would be triggered by the eating of the *third* candy bar.

The meaning of "a" thus depends on context. *See, e.g., Hagen v. Nodak Mutual Insurance Co.*, No. 99 Civ. 3562, 2000 WL 35528125 (D.N.D. May 8, 2000) ("As a general principle the use of an indefinite article may create an inherent ambiguity, depending on how the indefinite nature of the article is interpreted."). Although statutory context can eliminate ambiguity, *see S.E.C. v. KPMG LLP*, 412 F. Supp. 2d 349, 388 (S.D.N.Y. 2006), nothing else in § 16913(b) settles the choice between these two meanings of "a." While Gundy had completed "a single" sentence of imprisonment when time expired on the sentence for his Maryland conviction, SORNA can also be read to impose a duty to register before completing "any" sentence of imprisonment. In the latter case, the most natural reading (or at least a possible reading) of § 16913(b) is one that requires a defendant like Gundy—sentenced to multiple, consecutive terms of imprisonment "with respect to" the offense giving rise to the registration duty—to register before completing his final sentence of imprisonment.[2] Given this ambiguity in the statutory text, the Court must consult statutory purpose and the rule of lenity. As explained in the Opinion, these factors cut strongly in Gundy's favor. *See* 2013 WL 2247147, at *8-12.

Third, the structure of the statutory text provides a simpler explanation for the statute's use of the word

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[2] As noted in the Opinion, the Guidelines promulgated by the Attorney General lend support to this reading. They state that "SORNA's registration requirements generally come into play *when sex offenders are released from imprisonment*, or when they are sentenced if the sentence does not involve imprisonment." *Gundy*, 2013 WL 2247147, at *9 (quoting 73 Fed. Reg. 38,030, 38,045) (emphasis added).

"a"—one that weakens the Government's textual argument.

The discussion thus far has assumed that the Government correctly framed the relevant question by focusing narrowly on § 16913(b)(1). It is a basic rule of interpretation, however, that each sub-section of a statute must be read in the context of the larger statutory structure. As its title indicates, § 16913(b) is concerned with the timing of initial registration. To that end, § 16913(b) contemplates two classes of offenders: those who have been sentenced to imprisonment, § 16913(b)(1), and those who received non-carceral sentences, § 16913(b)(2). When Congress referred to offenders who have completed "a sentence of imprisonment," it did so only to distinguish offenders who received "a sentence *of imprisonment*" from offenders who were "*not* sentenced to a term of imprisonment." (emphasis added). This perspective clarifies why Congress used the indefinite article in § 16913(b)(1): it was not concerned with (or apparently aware of any need for) specifying *which* sentence of imprisonment triggers the duty of initial registration, but rather with separating those offenders who have received a carceral sentence from those who have received a non-carceral sentence. Use of the indefinite article to describe these classes makes sense, whereas it would have been strange for Congress to use the indefinite article as its method of indicating when in time a duty of initial registration attaches. As a result, it would be erroneous to require "a" to bear all the weight the Government places on it. In statutory context, the word "a" simply does not bear on the question whether Gundy's initial registration duty attached at the end of his Maryland sentence.

Accordingly, the Government's first textual argument does not succeed.

B.

The Government's second argument for reconsideration focuses on "with respect to." In sum, the Government notes that "offense" is used throughout SORNA to refer to the crime of conviction resulting in a defendant's registration obligation—in this case, Gundy's Maryland sex crime. Emphasizing that a violation of supervised release is distinct from any underlying state offense, and that Gundy's VOSR sentence punished his "breach of trust," the Government argues that the two convictions cannot be said to be "with respect to" one another.

The Court has already addressed and rejected an essentially identical version of this argument. *See Gundy*, 2013 WL 2247147, at *7-8. The Government is mistaken in its suggestion that the Opinion treated the VOSR sentence as part of, or as an extension of, the Maryland sentence. *See id.* at *7-8, *11; *see also id.* at *11 n.2 ("The Government raises the specter of a constitutional concern with this conclusion, since postrevocation penalties relate to the initial offense—and would raise an issue of double jeopardy if they were treated as punishment for the new criminal offense. *See Johnson v. United States*, 529 U.S. 694, 700 (2000). But that concern is misplaced. Acknowledging that Gundy's sentence for violation of his supervised release is a sentence 'with respect to' his Maryland criminal offense is not the same as concluding that it constitutes punishment for that offense. In other words, the Court can recognize the reality of a relationship between Gundy's conduct in

Maryland and his post-revocation penalties without implicating the double jeopardy issue noted in *Johnson*. As a result, there is no need to construe 'with respect to' in the shadow of constitutional avoidance."). As the Court noted in the Opinion, the phrase "with respect to" connotes relationships other than identity. *Id.* at *8. Here, "the violation that caused [Gundy's] [VOSR] sentence consisted of exactly the same conduct that gives rise to his registration requirement." *Id.* Further, that conduct constituted a violation of the terms of Gundy's supervised release only because it was, in fact, prohibited by the criminal law—and the terms of Gundy's supervised release were keyed, in part, to compliance with that body of law. At the very least, SORNA's text is ambiguous as to whether his VOSR offense was an offense "with respect to" his Maryland conviction.

C.

The Government also argues that treating Gundy as having been "required to register" no later than November 30, 2010 is consistent with SORNA's purpose. The Court considered and rejected similar purpose-related arguments in the Opinion, concluding that SORNA's purpose—as expressed in Second Circuit and Supreme Court precedent, the statutory text, and the Attorney General's implementing regulations—cuts firmly in Gundy's favor. *See id.* at *8-12. The Government advances only one novel argument: given that SORNA requires offenders to register in the jurisdiction of their conviction, and that SORNA aims to ensure that authorities do not lose track of sex offenders, it would be consistent with SORNA's purpose to prefer a rule whereby sex

offenders register while incarcerated in the jurisdiction of their offense.

Even to the extent that this argument clarifies an aspect of SORNA, the core purposes and operation of the statute, as described in the Opinion, override this single factor. *See id.* at *9 ("Given that there is virtually no risk that a sex offender will fall through the cracks or go missing while incarcerated, it would make little sense to apply SORNA's registration requirements and criminal provisions to incarcerated individuals. In fact, Congress recognized that the public is adequately protected against sex offenders locked behind bars: this is why sex offenders are not required under § 16913(b) to initially register until the *end* of their post-conviction carceral sentences."); *id.* at *10 ("A clear focus on offenders outside of custody runs through SORNA's text and its implementing regulations."). So do the weighty considerations of fairness and federalism—unaddressed in the Government's brief—that the Opinion highlighted as critical to any understanding of SORNA. *See id.* at *10 ("Inmates are regularly moved between jurisdictions while in custody. Often, these transfers are orchestrated without their consent. Even if those inmates enjoyed an affirmative defense under § 2250(b) to liability under § 2250(a) for failure to register while imprisoned, the result would [be] that a significant number of inmates have already satisfied elements (1) and (2) of § 2250 the moment they step past prison gates on their way to freedom. Failure to register within a short period would then perfect the § 2250 offense and return them to federal prison for an offense that, in the usual course, would implicate only the requirements of state sex offender registration

schemes."); *id.* at *11 ("The Government's proposed interpretation of SORNA would [] result in a disruption of the state-federal balance contemplated by Congress, as it would federalize a large swath of post-custody failure-to-register offenses that do not reflect any uniquely federal power or concern . . . . Moreover, this disruption in federalism would arise in a context shot through with questions of fundamental fairness, since in many cases the predicate act of interstate travel would have been imposed on an unwilling sex offender—who might well be excused from recognizing that failure to register in his new state violates SORNA, instead of state law.").

In any event, the Government's arguments rest on questionable assumptions. It is not clear, for instance, why an offender's jurisdiction of conviction is "uniquely situated to know whether the offender has been convicted of a sex offense." When inmates are transferred within jurisdiction or to new jurisdictions, there is every reason to believe that information about their offense and post-conviction requirements travels with them. Every facility to which Gundy was transferred, for example, was well aware of his status as a sex offender—and the Government offers no concrete evidence for its suggestion that prison officials have a difficult time tracking sex offender status.[3]

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[3] There is little record evidence addressed to the question of why Gundy did not register as a sex offender when he completed his Maryland sentence—or to the question of why Maryland State officials, who the Government insists are in the best position to handle such matters, failed to ensure Gundy's registration. But the record is replete with evidence that federal officials *were* aware of Gundy's status as a sex offender and *did* remind him of

Further, if an inmate were transferred from state to state—or from facility to facility—after initially registering, he would still have to register at each new location to ensure that the jurisdiction of conviction did not lose track of him. As a result, the reading of SORNA advanced by the Government still involves a series of registrations as inmates are moved from prison to prison—and thus presupposes the adequacy of registration schemes across facilities as prisoners are moved from one to the next. While initial registration may be unique in some respects, the Government has not explained how and why that uniqueness compels a rule that imposes a duty of initial registration at the end of the first prison sentence with respect to the offense giving rise to the registration duty. More broadly, the Government has not identified any reason for concluding that the view of SORNA set forth in the Opinion would thwart full realization of SORNA's purpose. Accordingly, the Government's purpose-based arguments do not warrant reconsideration of the Court's decision.

D.

In his motion to dismiss the indictment, Gundy presented several additional arguments for dismissal of the indictment which the Court did not reach, including (1) that SORNA violates the Commerce Clause and (2) that Gundy cannot lawfully be found to have "traveled in interstate commerce" for purposes of

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his duty to register. The facts of this case thus suggest that, in at least some instances, officials in the jurisdiction of conviction will be less capable than officials in a jurisdiction to which an inmate is transferred of ensuring that the inmate complies with SORNA's registration requirements.

criminal liability because he was "in custody" at the time of his interstate travel. In light of the Court's decision to deny reconsideration, it is unnecessary to resolve these alternative arguments. It should be noted, however, that the Second Circuit recently considered a Commerce Clause challenge to SORNA based (like Gundy's challenge) on the Supreme Court's decision in the Affordable Care Act case, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*"). The Second Circuit declined to revisit a prior decision upholding SORNA under the Commerce Clause, "not because [the defendant's] arguments all lack force, nor because the constitutionality of SORNA—particularly when applied within the states—is beyond question . . . . , but because the constitutionality of SORNA *as applied to [the defendant]* remains unaffected by any limitations on Congress's Commerce Clause power that may be found in *NFIB*." *United States v. Robbins*, 2013 WL 4711394, at *1 (2d Cir. Sept. 3, 2013) (emphasis in original). Applying the distinction between regulation of "activity" and "inactivity" from NFIB,[4] the Second Circuit in *Robbins* concluded that, as applied to the defendant in that case, SORNA regulated "activity" — "his change of residence and travel across state

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[4] The *Robbins* court noted that it is unclear whether the discussion of the Commerce Clause in Chief Justice Roberts' primary opinion in *NFIB* constitutes "more than dicta," *id.* at *4, but assumed for the sake of the argument that the statements about the Commerce Clause in that opinion—including the significance of the activity-inactivity distinction—constitute a holding of the Court when joined with the consistent views of the four dissenting Justices, *id.*

lines"—and that such activity "directly employ[ed] the channels of interstate commerce." *Id.* at *4.

This case presents closer questions under that analysis. In particular, is it fair to say that Gundy "traveled across state lines" for purposes of this criminal statute and the Commerce Clause given that he was *in custody* when he did so? And in light of his custodial status, was he "employ[ing] the channels of interstate commerce" in doing so? As noted, it is unnecessary to resolve those questions here. To the extent that these questions present serious constitutional issues, however, the doctrine of constitutional avoidance provides yet another basis for this Court's interpretation of the statute as applied to this case. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (Brandeis, J., concurring).

III. Conclusion

For the foregoing reasons, the Government's motion for reconsideration is DENIED.

SO ORDERED.

Dated: New York, New York
September 11, 2013

/J. Paul Oetken/
J. PAUL OETKEN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, -against- HERMAN AVERY GUNDY, Defendant.	13 Crim. 8 (JPO) **MEMORANDUM AND ORDER**

J. PAUL OETKEN, District Judge:

Herman Avery Gundy is charged with one count of failing to register as a sex offender under the Sex Offender Registration and Notification Act, 18 U.S.C. § 2250. Gundy has moved to dismiss the Indictment. For the reasons that follow, his motion is granted.

I. Background

On July 11, 1994, Gundy pleaded guilty in the Eastern District of Pennsylvania to one count of conspiracy to distribute cocaine base, in violation of 21 U.S.C. § 846 ("the Federal Conviction"). On February 5, 1996, he was sentenced to five years' imprisonment and five years' supervised release. In 2004, jurisdiction over Gundy was transferred from the Eastern District of Pennsylvania to the District of Maryland.

On October 3, 2005, Gundy entered an *Alford* plea in a Maryland state court to the crime of Sexual Offense in the Second Degree ("the Maryland Conviction"). That same day, he was sentenced in Maryland state court to 20 years' imprisonment and five years' probation, with 10 years of the 20-year sentence suspended.

On March 23, 2006, Gundy appeared in the United States District Court for the District of Maryland and admitted to a violation of his federal supervised release based on the Maryland Conviction. He was sentenced to 24 months' imprisonment and the remainder of his supervised release was terminated. This sentence was to be served consecutively to his Maryland sentence.

On June 15, 2011, Gundy was transferred from the custody of Maryland to the custody of the Bureau of Prisons (BOP) to serve the sentence imposed by virtue of his violation of the terms of his supervised release. Ultimately, he was sent to FCI Schuylkill in Minersville, Pennsylvania.

On March 23, 2012, Gundy signed a "Community Based Program Agreement." The Agreement contemplated that he would become "a resident" of an unspecified "residential reentry center [RRC] or work release program." On May 8, 2012, he signed a form titled "Conditions of Furlough." On June 7, 2012, Gundy signed a "Furlough Application – Approval and Record," which indicated that the "[p]urpose of the visit" that he sought was "[p]lacement in [an] RRC" in the Bronx, New York. This application stated that the "Method of Transportation" would be "bus/taxi." On June 12, 2012, the warden of FCI Schuylkill approved Gundy's furlough. That day, the warden signed a "Transfer Order" authorizing Gundy's transfer from FCI Schuylkill to the Bronx Residential Re-Entry Center in the Bronx, New York ("the Bronx RRC"). Gundy acknowledged that:

> I understand that if approved, I am authorized to be only in the area of the destination shown

> above and at ordinary stopovers or points on a direct route to or from that destination. I understand that my furlough only extends the limits of my confinement and that I remain in the custody of the Attorney General of the United States.

The furlough conditions limited approval to Gundy's "remain[ing] in the legal custody of the U.S. Attorney General, in service to a term of imprisonment." The warden also signed a form stating that Gundy had been "authorized for unescorted commitment" to the Bronx RRC.

On July 17, 2012, Gundy traveled via Greyhound bus from Schuylkill Haven, Pennsylvania to New York City and reported to the Bronx RRC. He was released from the Bronx RRC on August 27, 2012. Upon being released from the Bronx RRC, Gundy remained in the Bronx. He did not register as a sex offender in either New York or Maryland.

On September 13, 2012, Maryland issued a warrant for Gundy's arrest based on violation of the conditions of his probation relating to the Maryland Conviction. On October 24, 2012, law enforcement personnel arrested Gundy in the Bronx and transferred him to the custody of Maryland. Gundy was later transferred to the custody of the BOP. On January 7, 2012, Gundy was charged in this District with one count of violating 18 U.S.C. § 2250.

II. Standard of Review

"Since federal crimes are solely creatures of statute, a federal indictment can be challenged on the ground that it fails to allege a crime within the terms

of the applicable statute." *United States v. Zahavi*, 12 Cr. 288, 2012 WL 5288743, at *1 (S.D.N.Y. Oct. 26, 2012) (quoting *United States v. Aleynikov*, 676 F.3d 71, 75-76 (2d Cir. 2012)); *see also* Fed. R. Crim. P. 12(b)(2) ("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue."). "An indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events." *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992).

III. Discussion

A. SORNA

On July 27, 2006, Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 ("the Walsh Act"), Pub. L. No. 109-248, 120 Stat. 587. Title I of the Walsh Act codified SORNA, the declared purpose of which is to "protect the public from sex offenders and offenders against children . . . [by] establish[ing] a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901. Congress's principal purpose in enacting SORNA was "to make sure sex offenders could not avoid all registration requirements just by moving to another state." *United States v. Guzman*, 591 F.3d 83, 91 (2d Cir. 2010). As the Second Circuit has explained, "[r]equiring sex offenders to update their registrations due to intrastate changes of address or employment status is a perfectly logical way to help ensure that states will more effectively be able to track sex offenders when they do cross state lines." *Id.*

Title 18, United States Code, Section 2250(a) makes it a federal crime for certain sex offenders to violate SORNA's registration requirements. Section 2250 provides:

> (a) **In General.**— Whoever—
>
> (1) is required to register under [SORNA];
>
> (2)
>
> (A) is a sex offender as defined for the purposes of [SORNA] by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by [SORNA];
>
> shall be fined under this title or imprisoned not more than 10 years, or both.
>
> (b) **Affirmative Defense.**— In a prosecution for a violation under subsection (a), it is an affirmative defense that—
>
> (1) uncontrollable circumstances prevented the individual from complying;
>
> (2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

> (3) the individual complied as soon as such circumstances ceased to exist.

Read together, the subsections of § 2250 create criminal liability when the Government can prove three elements: (1) the defendant was required to register under SORNA; (2) the defendant traveled in interstate or foreign commerce; and (3) the defendant knowingly failed to register or update a registration as required by SORNA. "For a defendant to violate this provision . . . the statute's three elements must be satisfied in sequence, culminating in a post-SORNA failure to register." *Carr v. United States*, 130 S. Ct. 2229, 2235 (2010). Thus if a sex offender travels in interstate commerce and then fails to register before becoming subject to SORNA's registration requirements, he cannot be found guilty for violating § 2250(a).

In relevant part, SORNA's registration requirements are set forth in 18 U.S.C. § 16913:

> (a) **In general**
>
> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) **Initial registration**

The sex offender shall initially register—

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) **Keeping the registration current**

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) **Initial registration of sex offenders unable to comply with subsection (b)**

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex

> offenders and for other categories of sex offenders who are unable to comply with subsection (b).

"Absent a valid rule by the Attorney General, SORNA is not retroactive to defendants . . . who were convicted of sex offenses requiring them to register before July 27, 2006." *United States v. Stevenson*, 676 F.3d 557, 560 (6th Cir. 2012); *see also Reynolds v. United States*, 132 S. Ct. 975, 984 (2012) ("[T]he Act's registration requirements do not apply to pre-Act offenders until the Attorney General so specifies" pursuant to 42 U.S.C. § 16913); *United States v. Herbert*, 09 Cr. 438, 2009 WL 4110472, at *3 (N.D.N.Y. Nov. 20, 2009) ("Congress delegated to the Attorney General the authority to define the retroactive application of SORNA's provisions to sexual offenders whose convictions occurred before the passage of SORNA by Congress or before the full implementation of SORNA by a given jurisdiction." (citing 42 U.S.C. § 16913)).

On February 28, 2007, the Attorney General promulgated an interim regulation providing that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 72 Fed. Reg. 8894-01 ("the Interim SORNA Regulation"). On August 1, 2008, the "SMART Guidelines" went into effect. The Guidelines provided that:

> The applicability of the SORNA requirements is not limited to sex offenders whose predicate sex offense convictions occur following a jurisdiction's implementation of a conforming registration program. Rather, SORNA's

> requirements took effect when SORNA was enacted on July 27, 2006, and they have applied since that time to all sex offenders, including those whose convictions predate SORNA's enactment.

73 Fed. Reg. 38,030. The Sixth Circuit has described the provenance of these guidelines:

> On May 30, 2007, the Attorney General published proposed guidelines from the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, called the SMART guidelines. The SMART guidelines stated that they were promulgated pursuant to the Attorney General's authority under 42 U.S.C. § 16912(b) to interpret and implement SORNA and restated the Attorney General's position that SORNA applied to all sex offenders, "including those whose convictions predate the enactment of the Act." 72 Fed. Reg. 30,210, 30,212. These guidelines were made open to comments until August 1, 2007. On July 2, 2008, the Attorney General published the final version of the SMART guidelines. 73 Fed. Reg. 38,030. In the final version, the Attorney General responded to comments regarding the issue of retroactivity, but kept the language the same. The final SMART guidelines stated their effective date as July 2, 2008, the date of publication.

Stevenson, 676 F.3d at 560; *see also United States v. Kidd*, 11 Cr. 20, 2011 WL 3352457, at *2-3 (E.D. Tenn. Aug. 3, 2011) *aff'd*, 12-5420, 2013 WL 870263 (6th Cir. Mar. 11, 2013). On January 28, 2011, without

conceding that the Interim Rule and the SMART Guidelines were invalid, the Attorney General responded to further comments on the issue of retroactivity and finalized the Interim Rule to dispel any doubts regarding SORNA's retroactivity. 75 Fed. Reg. 81,849, 81,850. This final regulation provided that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3 ("the Final SORNA Regulation"). The Attorney General stated that the effective date of this latest final rule was January 28, 2011.

B. Whether Gundy Was "Required to Register" Under SORNA When He Traveled in Interstate Commerce

Gundy argues that the Indictment must be dismissed because he was not "required to register" under SORNA prior to when he crossed state lines by traveling from Pennsylvania to New York. He adds that he became subject to this duty only when he completed his continuous term of incarceration—at which point he was in New York. The Government disputes Gundy's arguments, insisting that Gundy has been subject to SORNA's registration requirements since SORNA was rendered retroactive. In the alternative, the Government might argue that Gundy became required to register under SORNA upon the completion of the sentence that he served in Maryland's prisons as punishment for the Maryland Conviction.

As an initial matter, the Government's suggestion that *every* sex offender has been subject to SORNA's

registration requirements, and "required to register" under SORNA, ever since the Attorney General issued regulations rendering SORNA retroactive, must be rejected. As the Supreme Court explained in *Carr* when presented with a similar argument:

> By its terms, the first element of § 2250(a) can only be satisfied when a person "is required to register *under the Sex Offender Registration and Notification Act*." § 2250(a)(1) (emphasis added). In an attempt to reconcile its preferred construction with the words of the statute, the Government insists that this language is merely "a shorthand way of identifying those persons who have a [sex-offense] conviction in the classes identified by SORNA." Brief for United States 19–20. To reach this conclusion, the Government observes that another provision of SORNA, 42 U.S.C. § 16913(a), states that the Act's registration requirements apply to "sex offender[s]." A "sex offender" is elsewhere defined as "an individual who was convicted of a sex offense." § 16911(1). Thus, as the Government would have it, Congress used 12 words and two implied cross-references to establish that the first element of § 2250(a) is that a person has been convicted of a sex offense. Such contortions can scarcely be called "shorthand." It is far more sensible to conclude that Congress meant the first precondition to § 2250 liability to be the one it listed first: a "require[ment] to register under [SORNA]."

130 S. Ct. at 2235-36. While *Carr* was focused on policing the line between pre-Act and post-Act offenders, its point is more generally applicable: the

status of being required to register under SORNA is not coextensive with the status of being a sex offender. Further, *Carr* must be taken as a caution that this first requirement—which sets in motion the sequence of events leading to criminal liability under § 2250—plays an essential role in the statutory scheme and has content independent of being subject *in general* to one or another of SORNA's requirements. *See id.* at 2238 ("Had Congress intended to subject any unregistered state sex offender who has ever traveled in interstate commerce to federal prosecution under § 2250, it easily could have adopted language to that effect."). Moreover, as explained *infra*, the Government's broad view of when a sex offender becomes required to register is incompatible with the statutory text.

Because SORNA was passed on July 27, 2006 and Gundy entered his *Alford* plea to the crime of Sexual Offense in the Second Degree in October 3, 2005, he is a pre-Act offender. The applicability of SORNA's registration requirements is therefore governed by § 16913(d), which authorizes the Attorney General to issue retroactivity guidelines. The Attorney General first did so on February 28, 2007 with the Interim SORNA Regulation, which provided that SORNA's requirements "apply to all sex offenders," including pre-Act offenders. He then promulgated the SMART Guidelines, which became effective on August 1, 2008 and stated that "SORNA's requirements took effect when SORNA was enacted on July 27, 2006, and they have applied since that time to all sex offenders, including those whose convictions predate SORNA's enactment." Courts have split over whether the Interim SORNA Regulation survives scrutiny as administrative action, *see United States v. Reynolds*,

710 F.3d 498, 507 (3d Cir. 2013), but the SMART Guidelines have consistently survived such challenges, *see United States v. Kimble*, No. 11 Cr. 611, 2012 WL 5906863, at *2 (W.D.N.Y. Nov. 26, 2012) (finding that "the SMART Guidelines established that SORNA became effective in 2008"); *United States v. Mullins*, No. 11 Cr. 103, 2012 WL 3777067, at *3 (D. Vt. Aug. 29, 2012) ("This Court has already followed every circuit to reach the question in holding that the Attorney General exercised his authority to declare the law applied to pre-Act offenders . . . when the SMART Guidelines took effect.").

Thus, at least as of August 1, 2008, while still serving his Maryland sentence, Gundy became subject to § 2250 and § 16913. *Stevenson*, 676 F.3d at 565 ("[T]he SMART guidelines can and do have the force and effect of law, and they establish that SORNA became retroactive as of August 1, 2008."). Section 16913(a), however, distinguishes between normal registration requirements and the initial registration requirement, providing that "a sex offender shall register . . . in each jurisdiction where the offender resides . . . . [and] *for initial registration purposes only*, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence" (emphasis added). Tracking this distinction, § 16913(b) provides that a "sex offender *shall initially register*—(1) *before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement*" (emphasis added). SORNA thus describes a general registration requirement and provides for an initial registration scheme. Any authority exercised by the

Attorney General pursuant to § 16913(d) would have rendered both § 16913(a) *and* § 16913(b) retroactive.

It would be nonsensical to conclude that Gundy was "required to register" under SORNA for purposes of § 2250(a)(1) *before* the date on which was required to "initially register" under § 16913. Therefore, a natural reading of § 16913(b)—together with other applicable law—suggests that Gundy's duty to register under SORNA did *not* become active on the date the SMART Guidelines took effect, on which date Gundy was serving his Maryland sentence. In other words, the SMART Guidelines did not render all pre-Act offenders immediately subject to a duty to register, such that the first element of SORNA will always be met for all pre- and post-Act sex offenders (also known as *all* sex offenders). Rather, as a pre-Act offender, Gundy became subject to SORNA's many requirements at least of the date the SMART Guidelines became effective. Those general requirements, however, include the specific requirement that a sex offender initially register "*before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement*" (emphasis added). This logic is confirmed by the SMART Guidelines, which explain that for sex offenders in prisoner populations at the time of SORNA's implementation, registration within the "normal SORNA time frame" means, as relevant here, "before release from imprisonment." 73 Fed. Reg. at 38,064. Gundy's sentence of imprisonment in Maryland for the sex offense to which he entered an *Alford* plea on October 3, 2005 plainly qualifies as a sentence covered by § 16913(b). Therefore, Gundy was

not required to register under SORNA at least until the end of that prison term.

The critical question, however, is whether Gundy's period of incarceration in Maryland, Pennsylvania, and New York for violation of the terms of his federal supervised release qualifies under § 16913(b) as a "sentence of imprisonment *with respect to* the offense giving rise to the registration requirement." If so, then Gundy did not become subject to SORNA's registration requirement until he was released from custody inside New York and Gundy's motion must be granted. If not, then Gundy became subject to SORNA's registration requirements at the end of the sentence imposed by Maryland's courts and his motion must be denied as to this argument.

The reading of § 16913(b) that best reconciles SORNA's text and purpose is that which *does* treat Gundy's sentence for violation of supervised release as "a sentence of imprisonment with respect to the offense giving rise to the registration requirement."

"As in any statutory construction case," analysis starts with the statutory text and "proceed[s] from the understanding that [u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, No. 12-236, 2013 WL 2149791, at *5 (U.S. May 20, 2013) (internal quotation marks and citations omitted). "If the text of a statute is ambiguous, then [the Court] must construct an interpretation consistent with the primary purpose of the statute as a whole." *United States v. Ripa*, 323 F.3d 73, 81 (2d Cir. 2003). Where a statutory ambiguity persists after examination of a statute's text, structure, and purpose,

the rule of lenity places a thumb on the scale against a finding of criminal liability. *See United States v. Santos*, 553 U.S. 507, 514 (2008). All three of these rules apply here.

As explained *supra*, § 16913(b) requires inmates to "initially register" after completing a prison term "*with respect to* the offense giving rise to the registration requirement." (emphasis added). This language, which is not addressed by SORNA's legislative history, is less than a model of clarity in specifying the required relationship between the "sentence of imprisonment" and the "offense giving rise to the registration requirement." The key term is "with respect to."

On the one hand, "with respect to" might be understood as "imposed as punishment for" the registration offense. On the other hand, "with respect to" might be understood in a broader sense as "relating to," "arising from," "regarding," or "in connection with." *See, e.g., American Heritage Dictionary* (4th ed. 2001) (defining "respect" as, *inter alia*, a verb that means "to relate or refer to; concern"); *Oxford English Dictionary* (2d ed. 1989) (identifying "with respect to" as definition I.4.e and cross-referencing to I.7.b., which defines "with respect" as meaning, *inter alia*, "[w]ith reference or regard *to* something" (emphasis in original)); *see also id.* (offering many definitions of "respect" that emphasize the relational character of this term, such as "1. *To have respect to*: a. To have regard or relation to, or connexion with, something . . . . b. To have reference, to refer, to something . . . 2. *To have respect to*: a. To turn *to*, refer *to*, for information . . . c. To give heed, attention, or consideration *to* something; to have regard *to*, to take into account).

Indeed, courts have made very different use of the term "with respect to." *See, e.g.*, *Magwood v. Patterson*, 130 S. Ct. 2788, 2806 (2010) (holding a habeas corpus application is "second or successive" for purposes of AEDPA where, "with respect to" a claim, the alleged error "could and should have" been raised in the first petition); *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705 n.4 (2d Cir. 2013) (examining circumstances under which a person "is a fiduciary with respect to a plan" under ERISA, and noting that when an entity acts with "dual roles," fiduciary duties are only implicated when it functions in its capacity as a fiduciary). The common thread across these opinions and definitions is that "with respect to" connotes a connection with or relationship to, though not necessarily or even usually a state of identity with, the object of the phrase.

In most cases, this ambiguity in the meaning of "with respect to" will not matter. If a sex offender serves a prison sentence for the offense that creates the duty to register, and is then released from custody, his duty is activated at the end of his time in prison. If that sex offender is later caught and convicted of another crime, the question whether he is obligated to register while in prison does not implicate the initial registration issue that the parties dispute in this case.

Gundy's situation, however, directly implicates the ambiguity in § 16913(b)'s reference to a "sentence of imprisonment *with respect to* the offense giving rise to the registration requirement" (emphasis added). Unlike most offenders—and unlike the typical offender that Congress and the Attorney General likely imagined when crafting the applicable law—

Gundy completed a sentence of imprisonment for his Maryland sex offense and then *immediately* began a consecutive sentence of imprisonment for his violation of federal supervised release, a violation premised on the same underlying Maryland sex offense. This transition occurred while he was incarcerated in the same prison in Maryland; one day, he was in the same cell for a different reason. He was never released from prison. He was not even moved to a different prison, at least not initially. And the violation that caused his supervised release sentence consisted of exactly the same conduct that gives rise to his registration requirement. Gundy thus served back-to-back sentences for a single course of conduct—his sex offense—which simultaneously broke Maryland's criminal code and the terms of his supervised release.

On this fact pattern, the textual question is whether Gundy's time in prison for violating his supervised release in this manner qualifies as a sentence "with respect to" his Maryland sex offense. The answer is no if the text is read to mean "imposed as punishment for the offense giving rise to the registration requirement." The answer is yes if the text is read to mean "relating to," "arising from," or "in connection with" the offense giving rise to the registration requirement. The difference is thus all-important to Gundy, yet unsusceptible to resolution through analysis keyed only to the statute's plain language. The phrase "with respect to" is too ambiguous in this context to serve as the definitive predicate of Gundy's conviction.

A combination of statutory purpose and rule of lenity must therefore guide the outcome. Starting with purpose, SORNA's criminal provisions are "not a

stand-alone response to the problem of missing sex offenders." *Carr*, 130 S. Ct. at 2240. Rather, § 2250 is "embedded in a broader statutory scheme enacted to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks." *Id.* That scheme includes provisions "repealing several earlier federal laws that also (but less effectively) sought uniformity; [] setting forth comprehensive registration-system standards; [] making federal funding contingent on States' bringing their systems into compliance with those standards; [] requiring both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current); and [] creating federal criminal sanctions applicable to those who violate the Act's registration requirements." *Reynolds*, 132 S. Ct. at 978.

Section 2250 thus plays a limited, though important, role in the larger SORNA scheme: "mak[ing] sure sex offenders could not avoid all registration requirements just by moving to another state." *Guzman*, 591 F.3d at 91. This is why "[t]he act of travel by a convicted sex offender may serve as a jurisdictional predicate for § 2250, but it is also, like the act of possession [under 18 U.S.C. § 922(g)], the very conduct at which Congress took aim." *Carr*, 130 S. Ct. at 2240. Thus, when sex offenders "use the channels of interstate commerce in evading a State's reach," their conduct implicates the animating purpose of SORNA's criminal provisions. *Id.* at 2238. Otherwise, however, Congress has given "the States primary responsibility for supervising and ensuring compliance among state sex offenders." *Id.*

Given that there is virtually no risk that a sex offender will fall through the cracks or go missing while incarcerated, it would make little sense to apply SORNA's registration requirements and criminal provisions to incarcerated individuals. In fact, Congress recognized that the public is adequately protected against sex offenders locked behind bars: this is why sex offenders are not required under §16913(b) to initially register until the *end* of their post-conviction carceral sentences. The Attorney General's SMART Guidelines confirm that "SORNA's registration requirements generally come into play *when sex offenders are released from imprisonment*, or when they are sentenced if the sentence does not involve imprisonment." 73 Fed. Reg. at 38,045 (emphasis added). The Guidelines add that "'imprisonment' as it is used in SORNA and these Guidelines refers to incarceration pursuant to a conviction, regardless of the nature of the institution in which the offender serves the sentence." *Id.*

This logic, which presupposes that there is little purpose to imposing a duty of initial registration on an incarcerated sex offender, appears again later in the SMART Guidelines:

> *Example 3*: A sex offender convicted in 1980 for an offense subject to lifetime registration under SORNA is released from imprisonment in 1990 but is not required to register at the time because the jurisdiction had not yet established a sex offender registration program. In 2010, following the jurisdiction's implementation of SORNA, the sex offender reenters the system because of conviction for a robbery. The jurisdiction will need to require

> the sex offender to register based on his 1980 conviction for a sex offense when he is released from imprisonment for the robbery offense. But it is not possible to carry out the initial registration procedure for the sex offender prior to his release from imprisonment for the registration offense—i.e., the sex offense for which he was convicted in 1980-because that time is past . . .
>
> . . . . In [cases like Example 3], the normal SORNA initial registration procedures and timing requirements will apply, but with the new offense substituting for the predicate registration offense as the basis for the time frame. In other words, such a sex offender must be initially registered in the manner specified in SORNA § 117(a) prior to release from imprisonment for the new offense that brought him back into the system, or within three business days of sentencing for the new offense in case of a non-incarcerative sentence.

73 Fed. Reg. at 38,063-64. Here, even though the offender would be incarcerated on a different offense than the offense giving rise to his duty to register, the Attorney General instructs states to view the initial registration requirement as one that arises at the *end* of the carceral sentence. This provision reflects SORNA's basic logic, which does not treat incarcerated sex offenders as a group subject to a duty of initial registration during their time in prison.

A clear focus on offenders outside of custody runs through SORNA's text and its implementing regulations. Section 16913 requires offenders to

register in each jurisdiction in which they reside, work, or study—requirements that all envision individuals outside of prison, free to go about their lives in multiple jurisdictions. Offenders are also required to periodically appear in person to keep their registration current, a mandate that further exemplifies Congress's presupposition that offenders with a duty to register are out of custody.

In the same vein, 42 U.S.C. § 16915(a) requires sex offenders to keep their "registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b) of this section." Offenders are thus relieved of the obligation to keep their registration current while incarcerated—yet another feature of SORNA's registration scheme that indicates Congress's focus on out-of-custody offenders and its recognition that the purposes of SORNA's criminal provisions are not ordinarily fulfilled by imposing registration requirements on incarcerated offenders. *See also* 42 U.S.C. § 16914 (requiring that as part of registration, offenders provide information of a sort associated with being out of custody rather than imprisoned, including license plate numbers for any cars they drive and information about where they work). The SMART Guidelines accordingly recognize that "[t]he proviso relating to custody or civil commitment" in § 16915(a) "reflects the fact that the SORNA procedures for keeping up the registration . . . generally presuppose the case of a sex offender who is free in the community." They do so, the Guidelines explain, because "[w]here a sex offender is confined, the public is protected against the risk of his reoffending in a

more direct way, and more certain means are available for tracking his whereabouts. Hence, SORNA does not require that jurisdictions apply the registration procedures applicable to sex offenders in the community during periods in which a sex offender is in custody or civilly committed." 73 Fed. Reg. at 38,068.

Thus, as manifested in its statutory text and implementing regulations, SORNA's purpose is not ordinarily served by imposing on inmates who have not been released from prison following their sex offense conviction a duty of initial registration.[1]

In many cases, such a requirement could lead to absurd results. Inmates are regularly moved between jurisdictions while in custody. Often, these transfers are orchestrated without their consent. Even if those inmates enjoyed an affirmative defense under § 2250(b) to liability under § 2250(a) for failure to register while imprisoned, the result would that a significant number of inmates have already satisfied elements (1) and (2) of § 2250 the moment they step past prison gates on their way to freedom. Failure to register within a short period would then perfect the § 2250 offense and return them to federal prison for an offense that, in the usual course, would implicate only the requirements of state sex offender registration schemes.

The Government's proposed interpretation of SORNA would thus result in a disruption of the state-federal balance contemplated by Congress, as it would federalize a large swath of post-custody failure-to-

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[1] A different question may arise if an inmate is released from custody, spends time in society, and is then returned to prison, but that question is not presented by this motion.

register offenses that do not reflect any uniquely federal power or concern. *See Carr*, 130 S. Ct. at 2238 (noting that Congress has given "the States primary responsibility for supervising and ensuring compliance among state sex offenders"); *see also United States v. Van Buren, Jr.*, No. 8 Cr. 198, 2008 WL 3414012, at *13 (N.D.N.Y. Aug. 8, 2008) *aff'd sub nom. United States v. Van Buren*, 599 F.3d 170 (2d Cir. 2010) (noting that SORNA "does not offend traditional notions of federalism *because it addresses something each state does not have the power to accomplish*—track registered sexual offenders as they move from state to state." (emphasis added)). Moreover, this disruption in federalism would arise in a context shot through with questions of fundamental fairness, since in many cases the predicate act of interstate travel would have been imposed on an unwilling sex offender—who might well be excused from recognizing that failure to register in his new state violates SORNA, instead of state law. Ultimately, the Government's view would undercut the purpose and logic of SORNA's criminal liability provisions. As the Second Circuit recognized in *Guzman*, § 2250 is designed to make sure that sex offenders cannot dodge registration requirements by skipping from one state to another. 591 F.3d at 91. The interstate travel is thus the very act at which SORNA takes aim. *See Carr*, 130 S. Ct. at 2238-40. Where an inmate is in continuous carceral custody throughout his period of interstate travel, and is therefore being monitored by the government at every step along the way, it defies reason to view a post-release failure to register as an effort to "use the channels of interstate commerce in evading a State's reach." *Id.*

There is no reason to believe that all these considerations are any less decisive in Gundy's case. He was incarcerated continuously throughout his consecutive sentences. He did not present a danger that the government would lose him, that he would fall through the cracks, or that he would "use the channels of interstate commerce in evading a State's reach." *Carr*, 130 S. Ct. at 2238. He did not pose a danger to the community while in prison. He would have been required to register upon his release from custody wherever that release took place; there is no reason to believe that his failure to register after being released from custody in New York implicates SORNA's purposes any more than his failure to register would have done had he been released in Maryland. In either case, he could have been punished by the state government for failing to register, or by the federal government if he subsequently moved in interstate commerce and knowingly failed to register as required by SORNA. In sum, it would not advance any core purpose of SORNA to conclude that Gundy's supervised release sentence was *not* a sentence of imprisonment "with respect to" his Maryland sex offense. SORNA is not designed to ensure that prisoners can be arrested for a federal crime in the very state where they are released from prison for the first time after serving a sentence "with respect to" their sex offense.[2]

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[2] The Government raises the specter of a constitutional concern with this conclusion, since postrevocation penalties relate to the initial offense—and would raise an issue of double jeopardy if they were treated as punishment for the new criminal offense. *See Johnson v. United States*, 529 U.S. 694, 700 (2000). But that concern is misplaced. Acknowledging that Gundy's

This conclusion is bolstered by the rule of lenity. As Justice Scalia has explained:

> Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

Santos, 553 U.S. at 514. Section 16913 is sufficiently ambiguous that even experienced counsel would have been hard-pressed to explain to Gundy his potential liability for failing to register upon his release from the RRC in New York. Given that Congress has not spoken clearly, that the notice function associated with statutory criminal law was clouded by ambiguity, and that the purposes of SORNA weigh against the imposition of liability, a construction of SORNA that precludes liability here is required.

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sentence for violation of his supervised release is a sentence "with respect to" his Maryland criminal offense is not the same as concluding that it constitutes punishment for that offense. In other words, the Court can recognize the reality of a relationship between Gundy's conduct in Maryland and his post-revocation penalties without implicating the double jeopardy issue noted in *Johnson*. As a result, there is no need to construe "with respect to" in the shadow of constitutional avoidance.

The SMART Guidelines do not alter—and in fact support—this conclusion. In the Guidelines, the Attorney General states that "jurisdictions must normally require that sex offenders be initially registered before release from imprisonment for the registration offense." He adds that, under § 117(a) of SORNA, "initial registration procedures are to be carried out 'shortly before release of the sex offender from custody' . . . . [J]urisdictions should implement this requirement in light of the underlying objectives of ensuring that sex offenders have their registration obligations in mind when they are released." 73 Fed.Reg. at 38,063. The Attorney General later notes that if a pre-Act offender started his carceral sentence *before* SORNA took effect and is released on "completion of imprisonment" *after* SORNA takes effect, that offender "can be registered prior to release from imprisonment in the same manner as sex offenders convicted following the enactment of SORNA and its implementation by the jurisdiction." *Id.*

Each of these SMART Guidelines provisions expressly contemplates a scenario in which the sex offender at issue is released from custody at the end of his term of imprisonment for the "registration offense." Thus, jurisdictions must "normally" require registration at that point—a qualification that implies the existence of cases where the duty to register does *not* attach at the end of the sentence imposed as punishment for the registration offense. This is one such case, as Gundy's consecutive sentence makes him unlike the "normal" sex offender. Further, states must register an offender before he is "released from custody," on "completion of imprisonment," or on "release from imprisonment." This language further

supports the conclusion that the Attorney General was not considering a situation like Gundy's in promulgating these rules. Even to the extent that Gundy was technically "released" from imprisonment for his registration offense when the basis for incarceration in Maryland shifted from a state crime to violation of supervised release, his continued presence behind bars removed him from the class of offenders contemplated by the plain terms of the SMART Guidelines. Thus, the SMART Guidelines arguably endorse Gundy's view of when he was required to register, since they repeatedly and logically link the initial registration requirement to release from custody.[3] In the alternative, they are ultimately silent as to this matter because it is not a "normal[ ]" case and the Court must look directly to § 16913(b)—the statute that the Attorney General is interpreting in the Guidelines.

The upshot of this analysis is that Gundy's duty to initially register was triggered shortly before he was released from custody in New York. Gundy was in custody when transferred from the Maryland prison to FCI Schuylkill, and then, by the plain language of the transfer documents, remained in the "legal custody of the [Attorney General], in service to a term of imprisonment" during his unsupervised transfer from Pennsylvania to New York. These documents confirmed that his transfer "only extend[ed] the limits

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[3] This analysis might be different if Gundy had been sentenced to consecutive prison terms for crimes that bore no relation—for instance, a sex offense and then an unrelated bank robbery—since in that scenario the robbery sentence might not qualify as a term of imprisonment "with respect to" to the sex offense. However, that issue is not presented in this case.

of [his] confinement" and his "custody." As a sex offender who was imprisoned for committing a sex offense and who then remained in custody continuously through his release in New York—first while serving a sentence imposed as punishment for the sex offense, and then while serving a post-revocation sentence "with respect to" the sex offense-Gundy was not "required to register" when he engaged in the interstate travel alleged in the Indictment and therefore cannot be held liable for a violation of § 2250.

Accordingly, the Indictment must be dismissed.

C. Gundy's Other Arguments In Support of Dismissal

Gundy also advances a number of other arguments in support of dismissal. Because the Court has granted his motion on statutory grounds, it need not reach his constitutional claims.

IV. Conclusion

For the foregoing reasons, Defendant's motion to dismiss the indictment is GRANTED.

SO ORDERED.

Dated: New York, New York
May 22, 2013

[J. Paul Oetken]
J. PAUL OETKEN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, -v.- HERMAN AVERY GUNDY, a/k/a HERMAN GRUNDY, Defendant.	13 Cr. 08 (JPO) [TRANSCRIPT] March 2, 2016 2:40 p.m.

Before:

J. PAUL OETKEN,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: EMIL BOVE
Assistant United States Attorney

FEDERAL DEFENDERS OF NEW YORK, INC.
Attorneys for Defendant
BY: MARK GOMBINER

* * *

[12:9]

THE COURT: Okay. I think I understand the arguments and I am prepared to rule. I am going to go through and, for the record, cover all of the arguments that were previously made that I did not address in my earlier rulings. As I understand it, there are really a few different challenges. The first three I think are constitutional challenges.

First, defendant argues that SORNA violates his Fifth Amendment Due Process rights and I will just note that similar arguments have been rejected by the Second Circuit and this Court rejects those arguments for the same reasons as I am required to do under binding precedent including *United States v. Hester*, 589 F.3d 86 at 91-94 (2d Cir. 2009). I conclude that the defendant did have sufficient notice of his obligation to register to meet the requirements of due process and I will just reference docket no. 17 at pages 18 to 19 which summarizes the reasons for that.

Second, defendant argues that SORNA improperly [13] delegates legislative authority to the Attorney General. The Second Circuit has ruled, however, that Congress did not improperly delegate authority to the attorney general in violation of the non-delegation doctrine with respect to SORNA. That's *United States v. Guzman*, 591 F.3d 83 at 92 (2d Cir. 2010) and the motion is therefore denied on that ground.

Third, the defendant argues that SORNA violates the commerce laws including by regulating inactivity under the Affordable Care Act, *NFIB v. Sebelius*, 132 S. Ct 2566, 2012. However, the Second Circuit has made clear that the *NFIB* case does not alter the Court's earlier rejection of the commerce clause argument in *Guzman*. See, *United States v. Lott*, 750 F.3d 214 at 220 (2d Cir. 2014), and this argument is rejected under that line of Second Circuit cases.

Finally I will come to the argument that we have been discussing today. The defendant argues that the indictment should be dismissed because the travel charged in the indictment does not amount to interstate travel within the meaning of Section

2250(a)(2)(B) or, in a related vein, the defendant's travel does not meet the mental state or *mens rea* requirement or voluntariness requirement for such interstate custody because he was in custody at the time of the travel.

I conclude that the indictment adequately alleges for purposes of Rule 7 that the defendant traveled in interstate commerce. The fact that he did so pursuant to a furlough to a [14] residential re-entry center in the Bronx and that therefore was "in custody" as a legal matter, does not alter the fact that he actually traveled in interstate commerce. In other words, there is no exception for the custodial status as a statutory text matter. I see no persuasive reason to read into the law an exception for when the travel across state lines is pursuant to a granted furlough and his transportation to a halfway house at least where the defendant engages in such travel unescorted by means of private transportation such as a Greyhound Bus. I don't need to decide whether there are other circumstances that present more closer questions or more difficult questions.

Similarly, with respect to the purpose of the statute I do not – I am not persuaded that the purposes of sort of falling off the grid are not implicated in this situation where, as I said, there was a furlough situation and the defendant was traveling on a Greyhound Bus even though, concededly, he was in custody as a legal matter.

The Supreme Court's decision in *Carr v. United States* merely required the government to prove the following three things sequentially:

One, that the defendant was required to register;

Two, that he subsequently traveled in interstate commerce; and

Three, that he thereafter failed to register or update his registration.

[15]

The interstate travel charged in the indictment is consistent with the statute and with what is required by the Supreme Court's decision in *Carr*.

The only aspect of the issue that remains, I think, is whether there is some sort of voluntariness or *mens rea* requirement with respect to the interstate travel itself. I conclude that if there is a mental state requirement it is, at most, knowing with respect to the interstate travel element. That is what is required under Section 2250(a)(3) with respect to the failure to register requirement and that would be the correct and appropriate mental state requirement here as well to the extent that there is such a requirement. And there is enough charged in the indictment to make that a question for the jury at trial. It might be a different situation where someone is literally dragged across state lines or put into a trunk and might not be aware of what is happening but that is not the situation we have here. I think there is enough, certainly enough charged here to satisfy any mental state requirement which would be knowing.

For these reasons, the defendant's renewed motion to dismiss the indictment at docket no. 42, is denied.

That's my ruling on the pending motion and let me just turn now to any scheduling issues we need to address in light of that ruling.

* * *

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES of America,
Appellant,

v.

Jesus Manuel GUZMAN,
Defendant-Appellee.

United States of America,
Appellant,

v.

David Hall,
Defendant-Appellee.

Docket Nos. 08-5561-cr, 08-6004-cr
[Decided: Jan. 7, 2010 Amended: Jan. 8, 2010]

OPINION

WESLEY, Circuit Judge:

The government appeals from orders of the United States District Court for the Northern District of New York (Hurd, *J.*) dismissing the respective indictments of Appellees Jesus Manuel Guzman and David Hall ("Appellees") pursuant to 18 U.S.C. § 2250(a) for traveling in interstate commerce and failing to register and update their sex offender registrations as required by the Sex Offender Registration and Notification Act ("SORNA" or "Act"). Although it rejected all of Appellees' other challenges to SORNA, the district court held that the underlying registration requirements of 42 U.S.C. § 16913 exceed the authority of Congress to regulate interstate commerce. *United States v. Hall*, 577 F. Supp. 2d 610, 623 (N.D.N.Y. 2008); *United States v. Guzman*, 582 F.

Supp. 2d 305, 312 (N.D.N.Y. 2008); *United States v. Hall*, 588 F. Supp. 2d 326, 329 (N.D.N.Y. 2008) (denying reconsideration). We consolidate these cases solely for the purposes of this appeal. We agree with the district court that Appellees' other arguments in support of dismissal lack merit. However, we disagree with the district court's holding that 42 U.S.C. § 16913 exceeds congressional power pursuant to the Commerce Clause of the United States Constitution and therefore reverse the rulings of the district court and reinstate the indictments.

Background

Hall

On April 3, 2008, the government filed a criminal complaint against David Hall alleging that he traveled in interstate commerce and knowingly failed to register and update his registration as a sex offender under 18 U.S.C. § 2250(a).[1] According to the complaint, Hall pleaded guilty to Sexual Misconduct in violation of N.Y. Penal Law § 130.20 on May 25, 2006, and was sentenced to one year of incarceration. The sentencing judge designated Hall a Level 3 sex offender, meaning that he was required to register as a sex offender with New York and keep that registration up to date. An affidavit that accompanied

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[1] SORNA became law as Title I of the Adam Walsh Child Protection and Safety Act of 2006, Pub.L. No. 109-248, 120 Stat. 587 (codified at 42 U.S.C. §§ 16901 *et seq.*, 18 U.S.C. § 2250). The Act encompasses, but is not limited to, both 42 U.S.C. § 16913, the underlying sex offender registration requirement, and 18 U.S.C. § 2250, which criminalizes failure to register or update registration for those who cross state lines. We will refer to each section individually by its number where it is relevant and at times, for convenience, SORNA as a whole where it is not.

the April 3, 2008 criminal complaint states that, although Hall initially registered as required, an annual registration verification form sent by New York to his registered address in June 2007 was returned by the United States Post Office. According to the affidavit, Hall's whereabouts remained unknown to New York until February or March 2008, when Hall applied for benefits and informed the Cayuga County Department of Health and Human Services that he had been in Charlottesville, Virginia until moving back to Auburn, New York with his girlfriend on February 22, 2008. The affidavit further states that Virginia officials confirmed that Hall did not register as a sex offender in Virginia. A federal grand jury indicted Hall under 18 U.S.C. § 2250(a) on April 9, 2008.

Hall moved to dismiss the indictment on the grounds that SORNA: (1) does not apply in his case because neither New York nor Virginia have implemented the terms of SORNA as required by 42 U.S.C. § 16912, and the United States Attorney General did not make SORNA retroactive; (2) violates the Ex Post Facto and Due Process Clauses as applied to him because it has not been implemented by New York or Virginia; (3) exceeds Congress's power under the Commerce Clause; (3) encroaches on powers reserved to the states by the Tenth Amendment; and (4) violates the congressional non-delegation doctrine.

On September 23, 2008, the United States District Court for the Northern District of New York dismissed the indictment. *Hall,* 577 F. Supp. 2d at 623. The district court rejected Hall's argument that non-implementation of SORNA by New York and Virginia precludes prosecution because, contrary to the

defendants' assertions, the Attorney General has specified that SORNA applies to sex offenses predating its enactment regardless of whether SORNA has been implemented by the relevant jurisdictions. *Id.* at 614-15 (citing 28 C.F.R. § 72.3 and 72 Fed.Reg. 30,228 (May 30, 2007)). The district court also concluded that Hall's ex post facto challenge was misplaced because § 2250 punishes knowing failure to register when moving between states and does not impermissibly increase the punishment for his underlying sex offense conviction. *Id.* at 615-16.

The district court was equally unconvinced by Hall's argument that requiring him to register violated his due process rights because it was impossible for him to have registered under SORNA when the relevant states have not yet implemented the statute's registration requirements. The court reasoned that, regardless of state implementation, Hall "could have fulfilled his obligation to register as a sex offender under SORNA by providing the [existing] Virginia and New York sex offender registries with the required information upon changing his residence." *Id.* at 616.

The district court rejected Hall's Tenth Amendment argument because Hall could not show that either New York or Virginia made any changes to their laws in order to comply with SORNA. *Id.* at 616-17. Because the states did not take the actions required by SORNA, the district court reasoned, their officials were not unconstitutionally commandeered into implementing federal law. *Id.* at 617. The district court further concluded that Congress had not impermissibly delegated its legislative authority to the Attorney General by enacting SORNA because the Act provided the Attorney General with an "intelligible

principle" to follow by granting only the "limited authority to determine the retroactive application of SORNA's registration requirements to individuals convicted of sex offenses prior to SORNA's enactment." *Id.* at 617-18.

The district court nevertheless dismissed the indictment. It determined that Congress overstepped its authority to regulate interstate commerce in enacting SORNA. *Id.* at 622. Although the district court held that § 2250(a)—which criminalizes travel in interstate commerce without updating one's registration under SORNA-does not run afoul of the Commerce Clause under *United States v. Lopez*, 514 U.S. 549 (1995), or *United States v. Morrison*, 529 U.S. 598 (2000), *see Hall*, at 577 F. Supp. 2d at 619, it concluded that the *underlying* SORNA registration requirement, 42 U.S.C. § 16913, is unconstitutional because "it lacks a jurisdictional element restricting its application to individuals who travel in interstate commerce." *Hall*, 577 F. Supp. 2d at 620. Because § 16913 requires registration when changing address, employment, or student status, without regard to state lines, the district court determined that the section was sustainable only if it regulated an activity substantially affecting interstate commerce. The court held it does not. *Id.* at 621-22. The district court then rejected the government's attempt to justify § 16913 via Congress's spending power, reasoning that SORNA's registration requirements were not predicated upon any action being taken by a state. *Id.* at 622. The district court dismissed the indictment because a conviction under § 2250 would necessarily rely on the registration requirement that it had determined was unconstitutional.

Guzman

On October 2, 2008, the government filed a superseding indictment in the Northern District of New York alleging that "[f]rom in or about May, 2007 through in or about April, 2008" defendant Jose Manuel Guzman traveled in interstate commerce and knowingly failed to register or update his SORNA registration in violation of 18 U.S.C. § 2250(a). According to a May 12, 2008 affidavit, following two convictions in New York, Guzman was designated a Level 2 sex offender and required as a matter of New York law to register and to keep his registration up to date. The affidavit further states that a June 2007 annual verification form sent by New York to Guzman's address was returned by the United States Post Office, and in February 2008 the United States Marshals in Syracuse received information indicating that Guzman was residing in Lawrence, Massachusetts. According to the affidavit, Guzman did not register as a sex offender in Massachusetts. He was arrested on April 29, 2008, and federally indicted.

Guzman's case was assigned to the same district judge who had previously dismissed Hall's indictment. Guzman moved for dismissal, and on October 17, 2008, the district court issued a decision dismissing the indictment. As in its decision in *Hall,* the district court rejected all of Guzman's arguments in support of dismissal, except for his argument that § 16913 exceeds Congress's authority under the Commerce Clause. *Guzman*, 582 F. Supp. 2d at 315. The court rejected the government's argument that § 16913 regulates activity that substantially affects interstate commerce in the aggregate, *see Wickard v. Filburn*, 317 U.S. 111 (1942) and *Gonzales v. Raich*, 545 U.S. 1

(2005), because it regulates an activity that is not economic in nature. *Guzman*, 582 F. Supp. 2d at 310-13. Similarly, the court rejected the government's argument regarding the aggregate economic "cost of crime" as foreclosed by the Supreme Court in *Lopez*. *Id.* at 311; *see also Lopez*, 514 U.S. at 563-66. The district court also held that the statute was not saved by the Necessary and Proper Clause as an integral part of a broader regulatory scheme, because "the [Necessary and Proper C]lause may not be used to sustain the regulation of intrastate activity having an insufficient effect upon interstate commerce if the more general statutory objective is outside the scope of the constitution." *Guzman*, 582 F. Supp. 2d at 313.

Discussion

The provisions of SORNA relevant to this appeal are fairly straightforward. Under 426 U.S.C. § 16913(a), a convicted sex offender must register "and keep the registration current, in each jurisdiction where the offender resides, . . . is . . . employ[ed], [or] is a student." With respect to initial registration, a sex offender must also register in the jurisdiction of conviction if it is not the offender's jurisdiction of residence. *Id.* For initial registration purposes, § 6913(b) provides that the individual must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or "not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." Section 16913(c) requires the registrant to inform at least one of the relevant jurisdictions of all relevant updates to his or her registration information within three days of a "change of name, residence, employment, or

student status." The jurisdiction so informed must then share that information with other jurisdictions where the offender is required to register. *Id.*; *see also id.* § 16921(b)(3). Section 16913(d) gives the United States Attorney General "the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before [SORNA's enactment on July 27, 2006] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section."

Under SORNA's criminal enforcement provision, 18 U.S.C. § 2250(a), if an individual who is required to register knowingly fails to register or keep the registration information current, the offender is subject to a fine, imprisonment, or both. However, in order for criminal liability to attach, the offender must "travel[ ] in interstate or foreign commerce, or enter[ ] or leave[ ], or reside[ ] in Indian country," or the offender's registration requirement must derive from "a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States." *Id.* § 2250(a)(2).

Other SORNA provisions require jurisdictions to maintain sex offender registries in conformance with the Act, and empower the United States Attorney General to issue guidelines and regulations interpreting and implementing the Act. 42 U.S.C. § 16912(a), (b). SORNA provides for a reduction in federal funding related to law enforcement for those

jurisdictions failing to "substantially implement" SORNA. 42 U.S.C. § 16925.

Guzman and Hall make virtually identical arguments urging us to affirm the district court's holding that the national sex offender registration requirements in § 16913 exceed Congress's constitutional authority to legislate pursuant to the Commerce Clause. They further contend that § 2250(a) similarly violates the Commerce Clause. We find neither of these contentions convincing, and are equally unpersuaded by the other constitutional arguments rejected by the district court.

Commerce Clause

The Constitution grants Congress the power "[t]o regulate Commerce ... among the several States." U.S. Const. art. I, § 8, cl. 3. The current framework for approaching questions of the scope of congressional authority to regulate interstate commerce derives from the Supreme Court's opinion in *United States v. Lopez*, 514 U.S. 549 (1995). *Lopez* broke down the Commerce Clause inquiry into three categories of congressional regulatory authority: (1) "[to] regulate the use of the channels of interstate commerce"; (2) "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "to regulate those activities having a substantial relation to interstate commerce." *Id.* at 558-59. In *United States v. Morrison*, the Supreme Court provided further guidance regarding the final category, articulating four factors to be weighed in determining whether an activity substantially affects interstate commerce: (1)

whether the regulated activity is economic in nature; (2) whether the statute contains an "express jurisdictional element" linking its scope in some way to interstate commerce; (3) whether Congress made express findings regarding the effects of the regulated activity on interstate commerce; and (4) attenuation of the link between the regulated activity and interstate commerce. 529 U.S. 598, 611-12 (2000) (internal quotation marks omitted). Moreover, in *Morrison*, the Supreme Court again firmly rejected the proposition that "Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617.

We have no difficulty concluding that § 2250(a) is a proper congressional exercise of the commerce power under *Lopez*. Section 2250(a) only criminalizes a knowing failure to register when the offender is either required to register by reason of a federal law conviction or "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country." These requirements stand in clear contrast to the lack of a jurisdictional predicate in the statutes at issue in *Lopez* and *Morrison* and are clearly intended to provide just such a jurisdictional nexus. According to the statute's explicit terms, a sex offender whose underlying conviction was obtained pursuant to state law and who never crosses state lines, international borders, or the boundaries of Indian country, cannot be criminally liable for failure to comply with SORNA. However, a convicted sex offender who travels interstate may incur criminal liability under the statute. Interstate travel inherently involves use of the channels of interstate commerce and is properly subject to congressional regulation

under the Commerce Clause. Moreover, *Lopez* explicitly acknowledges Congress's power to regulate persons traveling in interstate commerce. *Lopez*, 514 U.S. at 558; *see also United States v. Dixon*, 551 F.3d 578, 583 (7th Cir. 2008), *cert. granted on other grounds sub nom. Carr v. United States*, ___ U.S. ___, 130 S. Ct. 47 (2009). It comes as no surprise, then, that we join every other circuit that has examined the issue in concluding that § 2250(a) is a legitimate exercise of congressional Commerce Clause authority. *See United States v. George*, 579 F.3d 962, 966-67 (9th Cir. 2009); *United States v. Whaley*, 577 F.3d 254, 258 (5th Cir. 2009); *United States v. Gould*, 568 F.3d 459, 470-72 (4th Cir. 2009); *United States v. Ambert*, 561 F.3d 1202, 1210-11 (11th Cir. 2009); *Dixon*, 551 F.3d at 583-84; *United States v. Hinckley*, 550 F.3d 926, 940 (10th Cir. 2008); *United States v. May*, 535 F.3d 912, 921-22 (8th Cir. 2008).

The analysis of the constitutionality of SORNA's underlying registration requirement, § 16913, is more difficult, but ultimately leads to the same result. Appellees contend that § 16913 cannot be justified under the Commerce Clause because its scope is overly broad and may regulate purely intrastate activities by requiring sex offenders to register in the first place and to keep current in their registrations. However, § 16913 does not exist in a vacuum. Sections 2250 and 16913 "were enacted as part of the Adam Walsh Child Protection and Safety Act of 2006, and are clearly complementary: without § 2250, § 16913 lacks federal criminal enforcement, and without § 16913, § 2250 has no substance." *Whaley*, 577 F.3d at 259 (internal citation omitted).

SORNA was preceded by the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, which conditioned federal funding on states' enactment of sex offender registration laws. *See* 42 U.S.C. § 14071(g)(2). "By the time that SORNA was enacted in 2006, every State and the District of Columbia had enacted a sex offender registration law," *Gould*, 568 F.3d at 464, and SORNA does not penalize failure to register so long as a registrant previously convicted of a state sex offense remains in-state. Thus, with SORNA, Congress's goal was not simply to require sex offenders to register or to penalize the failure to do so, but rather to "establish[ ] a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901. In other words, Congress wanted to make sure sex offenders could not avoid all registration requirements just by moving to another state.

The Necessary and Proper Clause to the Constitution gives Congress the power to "make all laws which shall be necessary and proper" for its use of the commerce power. U.S. Const., art. 1, § 8, cl. 18. "Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce." *Raich*, 545 U.S. 1, 35 (2005) (Scalia, J., concurring); *see also, e.g.*, *Shreveport R. Co. v. U.S.*, 234 U.S. 342, 353 (1914). Requiring sex offenders to update their registrations due to intrastate changes of address or employment status is a perfectly logical way to help ensure that states will more effectively be able to track sex offenders when they do cross state lines. To the extent that § 16913 regulates solely intrastate activity, its

means "are 'reasonably adapted' to the attainment of a legitimate end under the commerce power," *Raich*, 545 U.S. at 37 (Scalia, J., concurring), and therefore proper. *See Whaley*, 577 F.3d at 260-61; *Ambert*, 561 F.3d at 1212; *United States v. Howell*, 552 F.3d 709, 714-15 (8th Cir. 2009).

Non-delegation

Appellees further contend that, in § 16913, Congress unconstitutionally delegated its legislative authority to the United States Attorney General. They argue that SORNA impermissibly grants the Attorney General congressional legislative authority because § 16913(d) delegates to the Attorney General the authority to specify the applicability of SORNA to sex offenders convicted before July 27, 2006, and § 16917(b) gives the Attorney General the power to prescribe rules to notify sex offenders who are not in custody or awaiting sentencing of their registration requirement.

As a preliminary matter, a circuit split exists about whether § 16913(d) does in fact authorize the Attorney General to determine the "retroactive" applicability of SORNA to sex offenders convicted prior to its enactment, or whether it only allows the Attorney General to determine how, as a practical matter, SORNA-effective with respect to all sex offenders from its enactment-should be implemented with respect to those convicted before SORNA was enacted. *See United States v. Cain*, 583 F.3d 408 (6th Cir. 2009) (former); *Hinckley*, 550 F.3d at 929-35 (latter); *United States v. Hatcher*, 560 F.3d 222, 226-29 (4th Cir. 2009) (former); *May*, 535 F.3d at 915-19 (latter); *United States v. Madera*, 528 F.3d 852, 857-

59 (11th Cir. 2008) (per curiam) (former).[2] Resolution of the issue presented by this circuit split, however, does not alter the outcome of the present cases. As discussed in greater detail below, if we interpret § 16913(d) narrowly, then defendants lack standing to challenge § 16913(d)'s delegation of authority; if, on the other hand, we interpret § 16913(d) broadly,

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[2] Section 16913(d) reads, in its entirety, "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section." Subsection (b) provides requirements for initial registration, i.e., it must be done "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement," or "not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." We do not decide whether § 16913(d) delegates to the Attorney General the authority to determine whether SORNA applies to sex offenders convicted prior to enactment, or whether it merely gives the Attorney General the specific authority to prescribe rules regarding SORNA's application to all, including those convicted of a sex offense prior to enactment, who are unable to initially register according to the terms of subsection (b).

It is possible that the Supreme Court will answer this question for us shortly, as it recently granted certiorari in *Carr v. United States*, ___ U.S. ___, 130 S. Ct. 47 (2009), in order to address whether § 2250 permits the conviction of individuals for failure to register where the underlying offense and travel in interstate commerce both occurred prior to SORNA's enactment, as well as any ex post facto problem that such an application might raise. However, we do not need to know whether § 16913 or the Attorney General's regulations make the registration requirement apply to those convicted of an underlying offense prior to SORNA's enactment in order to conclude that SORNA does not include an improper delegation of legislative authority.

defendants would have standing, but the merits of their arguments would not prevail. In either scenario, defendants' delegation arguments do not alter our conclusion that defendants' indictments should be reinstated.

According to those circuit courts that narrowly interpret the scope of § 16913(d), neither Guzman nor Hall would have standing to challenge § 16913(d)'s delegation of authority. *Hinckley*, 550 F.3d at 939; *May*, 535 F.3d at 920-21. These circuit courts interpret § 16913(d) as delegating authority to the Attorney General only with respect to those sex offenders who were unable to comply with § 16913(b)'s initial registration requirements. *Hinckley*, 550 F.3d at 939; *May*, 535 F.3d at 918-19. According to these courts, § 16913(d) does not commit any authority to the Attorney General with regard to sex offenders who were convicted prior to SORNA's enactment and who *already initially registered* as sex offenders with their respective states; therefore, according to these courts, defendants who have already initially registered as sex offenders lack standing to challenge § 16913(d)'s delegation of authority to the Attorney General. *Hinckley*, 550 F.3d at 939; *May*, 535 F.3d at 920-21. Thus, if we followed the lead of the Eighth and Tenth Circuits and narrowly interpreted the scope of § 16913(d), neither Guzman nor Hall would have standing to challenge § 16913(d)'s delegation of authority because both of them had already initially registered as sex offenders with their respective states before SORNA's enactment. In sum, applying this narrow interpretation of § 16913(d), Guzman and Hall's delegation arguments would not deter us from reinstating their indictments.

Likewise, even if we were to interpret § 16913(d) broadly, i.e., even if we were to interpret § 16913(d) as granting the Attorney General the broad authority to determine whether SORNA should apply to any sex offenders convicted before its enactment, the present defendants' delegation arguments would fail. A delegation is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). In other words, Congress needs to provide the delegated authority's recipient an "intelligible principle" to guide it. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *see also Mistretta v. United States*, 488 U.S. 361, 372-73 (1989). The Attorney General's authority under SORNA is highly circumscribed. SORNA includes specific provisions delineating what crimes require registration, 42 U.S.C. § 16911; where, when, and how an offender must register, *id.* § 16913; what information is required of registrants, *id.* § 16914; and the elements and penalties for the federal crime of failure to register, 18 U.S.C. § 2250.[3] *See Ambert*, 561 F.3d at 1214. If § 16913(d) gives the Attorney General the power to determine SORNA's "retroactivity," it does so only with respect to the limited class of

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[3] Appellees do not appear to challenge 42 U.S.C. § 16912(b), which directs the Attorney General to "issue guidelines and regulations to interpret and implement" SORNA. This is the broadest grant of authority in the Act. However, in light of the specificity of SORNA's goal to establish a "comprehensive national system for the registration of [sex] offenders," 42 U.S.C. § 16901, and the Act's substantive provisions, consideration of § 16912(b) would not change our analysis. *See, e.g., Mistretta*, 488 U.S. at 372-73.

individuals who were convicted of covered sex offenses prior to SORNA's enactment; the Attorney General cannot do much more than simply determine whether or not SORNA applies to those individuals and how they might comply as a logistical matter. If, on the other hand, § 16913(d) gives the Attorney General the authority only to *implement* SORNA with respect to all sex offenders, whether or not they were convicted pre-enactment, then the scope of that authority is even more circumscribed.[4] *See, e.g.*, Applicability of the Sex Offender Registration and Notification Act, 72 Fed.Reg. 8,894, 8,896 (Feb. 28, 2007) ("Considered facially, SORNA requires all sex offenders who were convicted of sex offenses in its registration categories to register in relevant jurisdictions, with no exception for sex offenders whose convictions predate the enactment of SORNA."). The Supreme Court has upheld much broader delegations than these. *See Mistretta*, 488 U.S. at 372-73.

Non-implementation by New York, Massachusetts, and Virginia

Appellees argue that their indictments warrant dismissal because New York, Massachusetts, and Virginia have not implemented SORNA at the state level. However, as a panel of this Court recently held, SORNA creates a federal duty to register with the relevant existing state registries regardless of state implementation of the specific additional

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[4] As already discussed, at least two circuit courts have held that defendants would not even have standing to challenge this more circumscribed delegation of authority. *See Hinckley*, 550 F.3d at 939; *May*, 535 F.3d at 920-21. Nevertheless, it is worth noting that even a less circumscribed delegation of authority, as discussed above, would survive scrutiny.

requirements of SORNA. *United States v. Hester*, 589 F.3d 86, 92-93 (2d Cir. 2009) (per curiam); *see also United States v. Brown*, 586 F.3d 1342, 1347-49 (11th Cir. 2009); *United States v. George*, 579 F.3d at 965; *United States v. Gould*, 568 F.3d 459, 463-66 (4th Cir. 2009). Furthermore, the Attorney General has the authority both to "issue guidelines and regulations to interpret and implement [SORNA]," 42 U.S.C. § 16912(b), and to "specify the applicability of the requirements of [SORNA] to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction," *id.* § 16913(d). The Attorney General has also issued regulations clarifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act."[5] 28 C.F.R. § 72.3; *see also* National Guidelines for Sex Offender Registration and Notification, 73 Fed.Reg. 38,030, 38,046-47 (July 2, 2008).

There is no express condition in the text of SORNA that the applicability of the registration requirement should depend upon state implementation of SORNA's terms. Nor is there any link between a state's obligation to comply with the statute-enforced via the threat of withheld funding-and an individual sex

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[5] The Ninth Circuit recently held that the application of SORNA's registration requirements with respect to juveniles who were adjudicated delinquent due to a sex offense prior to SORNA's enactment violates the Ex Post Facto Clause. *United States v. Juvenile Male*, 581 F.3d 977, 993-94 (2009). We do not need to address that question with respect to Hall or Guzman, as neither contends that he was a juvenile when convicted of his underlying sex offense.

offender's independent duty to register. *See Hester*, 589 F.3d 86, 92-93; *Gould*, 568 F.3d at 463-65. Moreover, even if SORNA is unclear by its own terms, the Attorney General has specified that an offender's obligation to register is not contingent on any jurisdiction's implementation of SORNA. 73 Fed.Reg. at 38,046, 38,063-64. Appellees do not and cannot contend that New York, Massachusetts, or Virginia did not have a functional sex offender registry during the relevant time periods.

Appellees further argue that, if SORNA applies to them in spite of the relevant states' non-implementation of its terms, then to apply it would violate the Ex Post Facto and Due Process Clauses. However, both Hall and Guzman were convicted of traveling interstate and failing to register, and in both of their cases the travel and failure to register occurred after SORNA's enactment and the effective date of the regulations indicating that SORNA applies to all sex offenders. *See* 28 C.F.R. § 72.3. There is, therefore, no ex post facto problem with their convictions. *See Weaver v. Graham*, 450 U.S. 24, 30-31 (1981). Moreover, the states in question all had registries in effect prior to Appellees' travel and failure to register; Appellees had notice of registration requirements and, by registering, could have complied with both federal and state laws. *See Hester*, 589 F.3d 86, 92; *Hinckley*, 550 F.3d at 939.

Commandeering

Although Appellees do not elaborate on appeal with respect to their argument that SORNA commandeers state officials into administering federal law in violation of the Tenth Amendment, *see Printz*

v. United States, 521 U.S. 898, 925-26 (1997), they did make this argument in the district court and on appeal have asked us to consider it by generally reasserting all claims raised in their motions to dismiss. However, as the district court noted with respect to Hall, Appellees have not shown that any of the states involved in their interstate travel have taken any steps to implement SORNA. *Hall*, 577 F.Supp. 2d at 617. Appellees' Tenth Amendment argument therefore necessarily fails.

Conclusion

Appellees' cases are hereby consolidated solely for the purposes of this appeal, and the district court's orders of (1) September 23, 2008, dismissing the indictment in *United States v. Hall*; (2) October 17, 2008, dismissing the superseding indictment in *United States v. Guzman*; and (3) December 4, 2008, denying the government's motion for reconsideration in *United States v. Hall*, are hereby REVERSED, the indictments REINSTATED, and the cases REMANDED to the district court to conduct further proceedings in accordance with this opinion.